Province of
British Columbia

1989

Court Jurisdiction

by John W. Horn

A Study Paper prepared for the
Attorney General's Rules Revision Committee
and published by the
Law Reform Commission of British Columbia

MINISTRY OF ATTORNEY GENERAL

RECEIVED
JUL 7 1989
VICTORIA, B.C.

COURT

JURISDICTION

by

John W. Horn, B.A., LL.B.

A Study Paper
prepared for the
Attorney General's
Rules Revision Committee
and published by the
Law Reform Commisson
of British Columbia

May, 1989

Canadian Cataloguing in Publication Data

Horn, John W.
Court jurisdiction

"A study paper prepared for the Attorney General's Rules Revision Committee."
Bibliography: p.
ISBN 0-7718-8790-6

1. British Columbia. Supreme Court. 2. Conflict of laws -- Jurisdiction - British Columbia. 3. Conflict of laws - Jurisdiction. I. Law Reform Commission of British Columbia. II. British Columbia. Ministry of Attorney General. Rules Revision Committee.

KEB535.4.H67 1989 347.711035 C89-092151-2

INTRODUCTORY NOTE

The Study Paper

This Study Paper is concerned with the extra-territorial jurisdiction of the Supreme Court of British Columbia. Its focus is a research paper prepared by John Horn for the Attorney General's Rules Revision Committee of which he is a member.

The research paper was a response to a long-standing concern of the Committee respecting the effect of the revision of the Supreme Court Rules in the mid-1970's. The revised Rules significantly relaxed the former rules respecting service of legal process outside the province. The Committee's concern centred on the relationship between the rules governing service outside the province and the substantive jurisdiction of the court. This relationship is not free of ambiguity and, in altering the former, it is likely that the latter had also been changed in some way. The Committee felt that a relatively detailed study of court jurisdiction itself was required -- thus the Horn study.

The Horn study was considered by the Committee early in 1988 and, at that time, a question was raised whether the Law Reform Commission might have a role to play in further developments with respect to the study. A number of factors argued in favour of Law Reform Commission involvement:

First, a degree of overlap exists between the Horn study and the Commission's project on the enforcement of extra-provincial judgments. That project, and its relationship to the Horn study will be described in greater detail below.

Second, many of the suggestions for change in the law that emerge from the Horn study go beyond what could reasonably be described as rules revision. The Law Reform Commission may be perceived as the appropriate vehicle for advancing broader changes in relation to court jurisdiction.

Third, the Law Reform Commission has the resources to bring the Horn study to a wider audience through its production and distribution as a Commission publication. It has the facilities and experience to deal with the comment and response that the study is expected to generate.

These factors, and our own sense that the Horn study was a document which deserved broader exposure in the legal and business community, made us very receptive to an invitation that we participate, in some fashion, in carrying forward this work.

The major change which reflects our involvement has been the addition of the overview which precedes the study itself. Since the study is being published for a more extended and diverse audience than the one at which it was originally aimed, the Commission felt that the study might be made more accessible to the non-specialist reader. We therefore requested Commission Counsel, Thomas G. Anderson, to prepare a document which might serve as a "roadmap" to the study. This was done in consultation with Mr. Horn and has his endorsement.

The Relationship of the Study Paper to Other Law Reform Commission Work

Work is currently in hand respecting the enforcement, within British Columbia, of judgments rendered by courts of other provinces. Our project on the *Enforcement of Extra-Provincial Judgments* is described in our *Annual Report* for 1988/89 in the following terms:

> Most Canadian provinces have enacted a version of the *Uniform Reciprocal Enforcement of Judgments Act*. In British Columbia it appears as Part 2 of the *Court Order Enforcement Act*. This is not reforming legislation. It merely provides a summary procedure to achieve the same final result as the common law alternative of suing on an extra-provincial judgment for money. There are still a variety of defences which may be raised to defeat the enforcement of such a judgment.
>
> The availability of these defences may be sensible with respect to judgments from outside Canada but, it may be argued, in a federation different considerations apply and judgments emanating from other Canadian provinces ought to stand on a somewhat different footing.
>
> The aim of this project is to examine some of the implications of relaxing the rules respecting the recognition and enforcement of judgments from other Canadian jurisdictions and whether it would be possible or desirable for a single jurisdiction to proceed in this way.

Particular attention is being devoted to the possibility of pursuing a "full faith and credit" policy with respect to judgments from the courts of other Canadian provinces. It will be noted that the subject matter of this project is also covered in

Chapter XXII of the Horn study, although the Commission's approach may, potentially, result in proposals for change that are somewhat more far-reaching than those suggested here.

In the course of our consideration of various issues in relation to the recognition and enforcement of extra-provincial judgments, it has become increasingly clear that our own project cannot credibly proceed without some consideration of jurisdictional issues. The viability of any approach which tends toward full faith and credit depends on the acceptability of the jurisdictional rules applied by other Canadian courts whose judgments may ultimately become enforceable in British Columbia. It is inappropriate, however, to embark upon such an exercise without subjecting our own jurisdictional rules to scrutiny. Thus, virtually the whole of the Horn study becomes relevant to our project.

Future Work

The scope and direction of the Law Reform Commission's work in this area is evolving slowly. It is too early yet to say whether the issues and concerns dealt with in the Horn study should become the subject of formal Commission recommendations. If so, should they form part of an expanded project which incorporates the work in relation to judgments? Or are they better dealt with as a discrete project?

The answers to these questions will be greatly influenced by the reception which this paper receives. Interested persons and groups are urged to consider the issues identified and the solutions put forward in the Horn study and to write to the Commission with views and suggestions on them.

It should also be stressed that the research, analysis, conclusions and proposals are those of the author only. This paper should not be regarded as an expression of the formal views of the Law Reform Commission.

Arthur L. Close,
Chairman

Law Reform Commission
of British Columbia

May 1989

Table of Contents

		PAGE
OVERVIEW OF THE STUDY PAPER		vi
A.	Introduction/Conflicts	vi
B.	"Jurisdiction"	vi
C.	Service on a Defendant	vi
	1. Introduction	vi
	2. Substantial Connection is not a basis of Jurisdiction	vii
	3. Service as a Basis of Jurisdiction	vii
	4. Service Outside the Territory	vii
	5. British Columbia	vii
	6. Need for Review	viii
D.	Approach Adopted in the Study Paper	viii
	1. Guiding Principle	viii
	2. Objective Rules	ix
	3. General Principles	ix
	4. Object of the Study Paper	x
E.	Vocabulary	x
	1. Domicile	xi
	2. Domiciliary	xi
	3. Residence	xi
	4. *Forum Conveniens*	xi
	5. *Forum Non Conveniens*	xii
	6. *Forum Rei Sitae*	xii
	7. *Lex Fori*	xii
	8. *Lex Loci Delicti*	xii
	9. Service *Ex Juris*	xii
I BRITISH COLUMBIA LAW OF JURISDICTION - GENERAL		1
A.	Introduction	1
B.	Statutory and Constitutional Provisions	2
C.	Common Law Jurisdiction	3
	1. Actions *In Rem*	3
	2 Actions *In Personam*	4
D.	Assumed Jurisdiction	5
E.	Declining Jurisdiction	5
F.	Recognition and Enforcement of Judgments	6
	Commentary	8
II INTER-STATE JURISDICTION IN A MULTI-STATE UNION		11
A.	Inter-State Jurisdiction in the United Kingdom	11
B.	Inter-State Jurisdiction in the European Economic Community	14
	1. "General Jurisdiction"	15
	(a) Domicile	15
	(b) Submission	17
	2. "Special Jurisdiction"	17
	(a) Contract	17

Table of Contents - *Continued*

PAGE

(b) Tort 17
(c) Injunctions 18
(d) Multiple Defendants 18
(e) Property 18
(f) Insurance and Consumer Contracts 18
3. "Exclusive Jurisdiction" 18
Commentary 19
C. Inter-State Jurisdiction in Australia 19
Commentary 22
D. Inter-State Jurisdiction in the U.S.A. 24
Commentary 27

III RELATIONSHIP BETWEEN JURISDICTION AND PRESENCE 28
A. "Presence" of Natural Persons 28
Commentary 28
B. "Presence" of Artificial Persons and Partnerships . 31
Commentary 32
Proposed Principle 33

IV RELATIONSHIP BETWEEN JURISDICTION AND DOMICILE OR RESIDENCE 34
Commentary 35
Proposed Principle 37

V RELATIONSHIP BETWEEN JURISDICTION AND CARRYING ON BUSINESS 39
Commentary 39
Proposed Principle 41

VI RELATIONSHIP BETWEEN JURISDICTION AND SUBMISSION 42
A. Contesting the Merits 42
B. By Initiating Process as a Plaintiff 43
C. By Prior Agreement 43
Commentary 44
Proposed Principle 46

VII RELATIONSHIP BETWEEN JURISDICTION AND NECESSARY PARTIES 48
Commentary 48
Proposed Principle 49

VIII RELATIONSHIP BETWEEN JURISDICTION AND IMMOVABLE PROPERTY 50
Commentary 51
Proposed Principle 52

Table of Contents - *Continued*

PAGE

IX RELATIONSHIP BETWEEN JURISDICTION AND MOVABLE PROPERTY 53
Commentary 53
Proposed Principle 54

X RELATIONSHIP BETWEEN JURISDICTION AND EXIGIBLE ASSETS WITHIN THE TERRITORY 55
Commentary 55
Proposed Principle 57

XI RELATIONSHIP BETWEEN JURISDICTION AND CAUSE OF ACTION - GENERAL 58
Commentary 58
Proposed Principle 60

XII RELATIONSHIP BETWEEN JURISDICTION AND CAUSE OF ACTION - CONTRACT 61
A. Contract Made in the Territory 61
Commentary 61
Proposed Principle 62
B. Contract Made by an Agent Residing Or Carrying on Business in the Territory 62
Commentary 63
C. Contract to be Performed in the Territory 64
Commentary 65
Proposed Principle 66
D. Contract Governed by the Laws of the Territory .. 66
Commentary 66
Proposed Principle 67
E. Damage Suffered in the Territory by Virtue of a Breach of Contract Committed Elsewhere 68
Commentary 68
Proposed Principle 68
F. Sale of Goods 68
Commentary 69
G. Interpretation of Contracts and Other Documents . 69
Commentary 70
Proposed Principle 70

XIII RELATIONSHIP BETWEEN JURISDICTION AND CAUSE OF ACTION - CONSUMER CONTRACTS 71
Commentary 72
Proposed Principle 74

Table of Contents - *Continued*

PAGE

XIV RELATIONSHIPS BETWEEN JURISDICTION AND CAUSE OF ACTION - TORT 76
Commentary 78
Proposed Principle 82

XV RELATIONSHIP BETWEEN JURISDICTION AND CAUSE OF ACTION - DEFECTIVE PRODUCTS ... 83
Commentary 83
Proposed Principle 86

XVI RELATIONSHIPS BETWEEN JURISDICTION AND CAUSE OF ACTION - THREATENED WRONGS 87
Commentary 87
Proposed Principle 88

XVII RELATIONSHIP BETWEEN JURISDICTION AND CAUSE OF ACTION - PERSONAL STATUS 89
Commentary 91
Divorce and Nullity 91
Custody, Access and Guardianship 91
Proposed Principle 92

XVIII RELATIONSHIP BETWEEN JURISDICTION AND CAUSE OF ACTION - WILLS, ESTATES AND TRUSTS 94
A. Grant of Probate and Letters of Administration ... 94
Commentary 94
Proposed Principle 95
B. Probate Actions 95
Commentary 96
C. Administration Actions 96
Commentary 96
Proposed Principle 97
D. Interpretation of Wills 97
Commentary 97
Proposed Principle 98
E. Trusts and Trustees 98
Commentary 99
Proposed Principle 100

XIX MISCELLANEOUS RELATIONSHIPS 101
A. Actions upon Judgments 101
Commentary 102
Proposed Principle 102
B. Taxes 102
Proposed Principle 103

Table of Contents - *Continued*

PAGE

XX GENERAL DISCRETION TO ASSUME JURISDICTION 104
Commentary 105
Proposed Principle 106

XXI GENERAL DISCRETION TO DECLINE JURISDICTION 108
A. *Forum Non Conveniens* - Adoption of Principle .. 109
B. *Forum Non Conveniens* - The Test 111
Commentary 115
Proposed Principle 118
C. Terms Upon Which a Stay Should Be Granted ... 119
Proposed Principle 119

XXII RECOGNITION AND ENFORCEMENT OF JUDGMENTS 121
A. Recognition 122
1. At Common Law 122
(a) Judgments *In Personam* 122
(b) Judgments *In Rem* 122
2. By Statute 123
B. Enforcement 124
1. At Common Law 124
2. By Statute 124
C. Defences 125
Commentary 126
Proposed Principle 132

XXIII PRACTICE AND PROCEDURE 133
A. Form of Originating Process 133
B. Endorsement of Grounds of Jurisdiction 133
C. Mode of Domestic Service under the Rules 134
Proposed Principle 134
D. Mode of Service Under Contract 134
Proposed Principle 134
E. Mode of Service under the Rules 135
F. Mode of Service under Treaties 135
Commentary 137
Proposed Principle 137
G. Mode of Service Under Other Statutes 138
Proposed Principle 138

XXIV THE NEED FOR REFORM AND SUGGESTIONS FOR IMPLEMENTATION 139

XXV SUMMARY OF PROPOSED PRINCIPLES 143

BIBLIOGRAPHY 155

OVERVIEW OF THE STUDY PAPER

A. Introduction/Conflicts

Few areas of the law are as complex as that which governs disputes having a foreign element. Is the dispute governed by the laws of country A or country B? Which court in which country should (or may) hear a dispute? These are some of the questions addressed by that area of the law known as conflicts of law or private international law.

B. "Jurisdiction"

This Study Paper looks at one part of the law of conflicts which is called jurisdiction. The term itself is an unfortunate one, since it has several different meanings. It can mean, for example, a geographic area with politically defined borders. That is not the general meaning it has in this Study Paper.

In North and Cheshire, *Private International Law*, jurisdiction is used "in its widest sense to refer to the question of whether a...court will hear and determine an issue upon which its decision is sought." That is the primary meaning jurisdiction has in this Study Paper, although the use of the term in more than one sense is sometimes unavoidable.

The object of this introduction is to provide a road map to the Study Paper, in an attempt to make the route a little easier going. What follows is an overview, which must be excused for its simplicity. A more rigorous approach is adopted in the Study Paper.

C. Service on a Defendant

1. Introduction

When should a court have power to hear and resolve a dispute? Before 1852 that question was relatively easy to answer because the courts could not summon absent defendants. This section examines the general principles that have been developed since 1852 to answer that question.

2. Substantial Connection Is Not A Basis Of Jurisdiction

One would expect that a court would accept jurisdiction if the dispute was connected in some way with the court's geographic location. For example, if the defendant resided in the court's territory, or some part of the subject matter of the dispute was associated with the territory, it would seem appropriate for the court to hear the matter. Instead, subject to a few minor exceptions, the issue of whether the court could hear the matter was resolved by looking to where the defendant was present.

3. Service As A Basis Of Jurisdiction

So long as the defendant was served with a writ in the court's territory, the court could hear the matter. When plaintiff and defendant resided in the same locality, the rule caused no difficulty. If they were present in different locations, the rule effectively ignored any issue relating to the degree of connection between the court's territory and the subject matter of the dispute or the litigants.

4. Service Outside The Territory

Often a simple rule can only serve the needs of a simple society. As the business of one nation spilled over its borders, so that disputes involving international elements took place, problems arose. The rule based on service of a writ within the borders of the country, for example, allowed a defendant to evade the court, and justice, by leaving the country.

This defect in the law was first met in England in 1852 and, since that time, legislation and court rules have been enacted which permit the court to authorise the service of a writ on a defendant who is outside the country. Under this approach, the plaintiff is required to apply for leave to serve the writ. To obtain leave, he must establish that it is appropriate for the matter to be heard by an English court (in other words, that the court is a "*forum conveniens*").

5. British Columbia

British Columbia followed England's lead, although under the current rules there is usually no need to obtain the court's permission to serve a defendant outside the province.

The rules list specific circumstances where a person may be served outside the province without the leave of the court.

The rules governing service outside the court's territory ("*service ex juris*"), consequently, control when a court has jurisdiction over a person outside the province. While it is usually no longer necessary for a plaintiff to establish that a British Columbia court is *forum conveniens*, it is open to the defendant to invite the court to decline jurisdiction on the basis that it is not the appropriate forum to hear the matter (*forum non conveniens*). This is a recent development, although the court has always asserted the ability to decline jurisdiction where the selection of it as a forum is designed to harass or inconvenience the defendant.

6. Need For Review

The problem is that courts, in British Columbia and other locations, are all too ready to accept jurisdiction even if it is more appropriate for a court in another location to hear the matter. This may be convenient for the plaintiff (who is able to select where he will litigate). It will often be inconvenient, and a source of injustice, to the defendant, whose ties with the location selected by the plaintiff may be negligible or non-existent.

For that reason, it is desirable to review the current law and attempt to identify those situations where a court should accept jurisdiction over an absent defendant, and those cases where it should not.

D. Approach Adopted in the Study Paper

1. Guiding Principle

Looked at afresh, the issue really is one of fairness, and the guiding principle relied upon in this Study Paper to determine when a court will have (or should accept) jurisdiction to hear a particular matter is whether there is a substantial connection between the court's geographic location, and the litigants or the subject matter of their dispute. Relying on that principle, it is possible to identify particular factors which suggest that the court should, or should not, accept jurisdiction. The object of this Study Paper is to categorize those fac-

tors and to begin the formulation of objective rules for the resolution of problems that arise when a defendant resides outside the court's territory.

2. Objective Rules

Why is it not enough simply to identify that the guiding principle is substantial connection with the court's territory and leave its application to the courts? For one reason, no one could be entirely certain whether a particular factor provided a sufficient connection for a court to take jurisdiction.

It is not the function of this introduction to list the kinds of factors which suggest that a court should take jurisdiction. These factors, and the reasons for selecting them, are canvassed in the Study Paper.

The kinds of factors identified fall into three general groups. The presence of some factors are good reason for a court to have jurisdiction. For example, the court should have jurisdiction over a defendant who has a place of business in the province, even if he resides outside the province.

The Study Paper also identifies factors which some might think indicate a substantial connection but which, for various reasons, should not in themselves give a court jurisdiction. For example, serving a defendant in the province is not good reason for the court to have jurisdiction over a defendant who has no other ties with the province. If factors in this category are present, a court in the province should not have jurisdiction because a court in another territory is better placed to hear the dispute (it is a more appropriate forum).

A third, and last, category consists of factors which are neutral as to which territory's courts should have jurisdiction and the issue must be resolved by considering which is the (more) appropriate forum in the light of all of the elements of the dispute.

3. General Principles

By developing rules to help select the appropriate forum to hear the matter, the problems that arise when a court accepts jurisdiction too readily can be avoided. An important part of building the structure to accomplish this is to define with some precision the *general* principles that must govern

when objective rules do not serve to determine the forum to hear the dispute. General principles must be developed to guide a court in identifying

(a) when it should assume jurisdiction; and

(b) when it should decline jurisdiction in deference to the courts of another territory.

The Study Paper defines the principles that should apply in these circumstances (as well as special rules to assist in changing the forum for resolving the dispute from the courts of one territory to those of another.)

4. Object Of The Study Paper

The reader of this Study Paper will encounter a large number of unfamiliar ideas, as well as complicated concepts. Keep in mind that the issue in every case is: where the defendant resides outside the province, on the particular facts under consideration, should a court in the province have jurisdiction to hear the matter? Or should it defer to a court in another territory? The specific principles derived in the Study Paper each exemplify the guiding principle that a court should have jurisdiction only where there is a substantial connection between the litigants or the subject matter of their dispute and the court's territory.

Some of the principles defined by Mr. Horn are uncontroversial. Others may be regarded by some as contentious. This Study Paper is intended as a starting point for devising the principles that should apply. Once these are identified, a comprehensive code can be developed to determine when the court should exercise jurisdiction over a defendant. For that reason, comment is particularly welcome.

E. Vocabulary

Even in the course of this intentionally simplified overview, terms have had to be used that are unfamiliar to all except those expert in the law of conflicts. These terms, and others similarly obscure, will also be encountered in the Study Paper. Included in this section are general definitions of some of these terms. For more technical definitions, the reader

should consult a legal dictionary or a text dealing with conflicts.

1. Domicile

Sometimes it is important to associate a person with a particular country. People, however, may have residences in two or more territories. How should the law pick one location from among several as the place with which a person has, at least in the eyes of the law, the closest connection? Domicile serves that purpose.

A person's domicile, essentially, is his "permanent home" but it is not determined simply by where a person resides. A person, for example, may have domicile in a country where he does not and never has resided. Rules ensure that a person only has one domicile. They also ensure that he has at least one domicile.

2. Domiciliary

A person who has his domicile in a particular country is a domiciliary of that country.

3. Residence

The residence of a natural person is the place where he or she dwells. The residence of a corporation is the place where its management (or, perhaps, its business) is carried on. Unlike domicile, residence is very much a question of fact.

A person may have more than one residence.

4. Forum Conveniens

When a plaintiff may not as a matter of right issue a writ and serve it on a defendant who is outside the province, he must apply to the court for leave to do so. In that case, he must convince the court that it is *forum conveniens*, or an appropriate forum for hearing the dispute. A court may be *forum conveniens* even if another court in another territory is a better forum (in terms of the convenience of the litigants, the degree of connection between the subject matter of the dispute and the territory, or other practical or administrative concerns).

5. FORUM NON CONVENIENS

Even if a court has (or accepts) jurisdiction, the defendant may apply to the court and ask it to decline jurisdiction. A court will decline jurisdiction, and defer to the courts of another territory, where it is *forum non conveniens* (where it is not the appropriate court to hear the matter).

6. FORUM REI SITAE

"*Forum*" refers to a location. "*Rei*" is a thing or, in this context, the subject matter of a dispute. Where the subject matter of the action is associated with a particular territory, the territory (or, rather, its court) is the *forum rei sitae.*

7. LEX FORI

Different countries have different laws. *Lex fori* refers to the law of the country in which the court is located (the law of the forum).

8. LEX LOCI DELICTI (or *locus delicti*)

"*Delicti*" means wrong and refers to a tort. "*Lex*" means law. "*Loci*" means place. The *lex loci delicti* is the law of the country where the wrong was committed.

9. SERVICE EX JURIS

Service *ex juris* refers to service of court process outside the court's territory.

Thomas G. Anderson,
Counsel

Law Reform Commission
of British Columbia

AUTHOR'S NOTE

Because this study is a survey and not a research paper, I have, in general, not referred to original sources such as judgments or statutes. The authority quoted is generally a text or an article. To save footnote space, only the name of the author and page or section number is given. The bibliography at the end of this paper will give the full citation and, where appropriate, the edition consulted. Where the author is cited in relation to more than one text or article, the number in brackets following the author's name is the number of the text or article cited other than the first.

John W. Horn

CHAPTER I BRITISH COLUMBIA LAW OF JURISDICTION - GENERAL

A. Introduction

In 1976, new Supreme Court Rules were enacted in British Columbia embodying massive revisions. The Rules relating to service of process outside of British Columbia were not, however, radically changed. The requirement to obtain leave to serve process out of British Columbia was eliminated, and the question whether such service was proper was to be raised not before service, but after service upon objection by the defendant. The list of circumstances in which a plaintiff could serve process out of the jurisdiction was not substantially altered.[1] The court was empowered to grant leave to serve process out of British Columbia in cases not provided for by the Rules. No evaluation of the basis upon which the courts of British Columbia should exercise or decline jurisdiction was undertaken.

The Rules of Court of several other provinces have also undergone fundamental revision recently and rules affecting service out of the province have been introduced which differ from those found in British Columbia.[2] Since the 1976 revision of the British Columbia Rules, the United Kingdom has, in consequence of joining the European Economic Community, fundamentally altered its rules relating to jurisdiction over persons and things within the Community and within the three "law districts" which make up the United Kingdom. Several significant judgments of Canadian courts have been handed down which affect the question of the court's jurisdiction in matters involving foreign elements.[3] There has been a surge of academic writing which has critically examined the present rules relating to jurisdiction.[4] Law reform agencies and the Uniform Law Conference of Canada have

1. Subparagraph (o) of Rule 13, appears to have been added.
2. The Nova Scotia and Prince Edward Island Rules now impose no restrictions on the service of originating process on defendants in Canada and the United States. In other cases leave must be obtained, but there are no categories provided within which the claim must fall. Ontario and New Brunswick Rules now provide that a court may grant leave in cases falling outside of the listed categories. Newfoundland has retained the requirement for leave and the conventional categories.
3. Notably, the decision of the Supreme Court of Canada in *Moran* v. *Pyle National (Canada)*, [1975] 1 S.C.R. 393, [1974] 2 W.W.R. 586, which has transformed the law in the area of jurisdiction in relation to tort actions.
4. In Canada, of particular interest are the writings of Sharpe; Edinger; Swan; and Hertz.

made recommendations in specific areas of law affecting jurisdiction.[5]

In the light of these developments, the subject of jurisdiction needs to be freshly examined.

It is important to recognize, however, that our law of jurisdiction is a complex mix of substantive and procedural law, of common law and statute law, reciprocal treaties and Rules of Court. Any changes to one element must be undertaken with care and an appreciation of their effect upon and the limitations imposed by the other elements.

Furthermore, British Columbia, though a separate and independent "state" for purposes of exercising civil jurisdiction, is a member of a federation of "states." The laws relating to assertion of jurisdiction by British Columbia courts and the recognition and enforcement in British Columbia of judgments rendered in assertion of jurisdiction by the courts of other provinces must take cognizance of this fact.

This study, consequently, was conducted to provide information in the following areas:

(1) What is the governing law as to the jurisdiction of British Columbia courts in matters involving foreign elements?

(2) What valid criticisms are there of the present law as to jurisdiction?

(3) What laws govern jurisdiction of "states" within a federation similar to that of Canada, and can such laws offer British Columbia guidance in dealing with its sister "states" within the Canadian federation?

B. Statutory and Constitutional Provisions

The *Constitution Act, 1867* confers powers upon a provincial legislature to make laws about property and civil rights in the province (s. 92(13)) and about the administration of justice in the province including the constitution of provin-

5. *E.g.*, the Manitoba Law Reform Commission: *Report on Section 83 of the* Queens Bench Act (1986); The Ontario Law Reform Commission: *Report on Products Liability* (1979); The Uniform Law Conference of Canada: *Interim Report on Products Liability* (1982); the Uniform Law Conference of Canada: *Interim Report on Service Abroad of Judicial and Extra-Judicial Documents* (1982).

cial courts of civil jurisdiction and including procedure in civil matters in those courts (s. 92(14)).

Section 8 of the *Supreme Court Act* provides that "the court continues to be a court of original jurisdiction, and shall have complete cognizance of all pleas, and shall have jurisdiction in all cases, civil and criminal, arising in the Province."

The phrase "in the Province" in section 92(13) of the *Constitution Act, 1867* has been held to limit the extra-territorial operation of provincial legislation. However, it has not been seriously questioned that the province, by enactment of Rules of Court, or the Supreme Court, by the exercise of its original jurisdiction, may assert jurisdiction over persons and things not resident or present in the province.[6] It has been assumed that the Supreme Court of British Columbia has the same civil jurisdiction over persons and things as had the superior courts of England[7] and that the legislature of the province may by statute or Rules of Court enlarge that jurisdiction.[8]

C. Common Law Jurisdiction

1. Actions In Rem

At common law there was a distinction drawn between actions *in personam* and actions *in rem*.

An action *in personam* is an action against a person with a view to enforcing the doing by him of some particular act (*e.g.*, payment of monies, specific performance) or the forbidding of his doing a particular act (*e.g.*, injunction).[9] The object of the proceeding is to establish rights between the parties and not rights as against the whole world.

An action *in rem*, on the other hand, is an action to establish a right such as ownership good against all persons in

---

6. Hertz; Sullivan; Edinger; McLeod, p. 85, note 33; Edinger (3) pp. 302-307; Swan, p. 294; Ontario Law Reform Commission, pp. 119-122.

7. The source of the jurisdiction of a County Court over persons or things not resident or present in the province does not seem to have been considered separately. Presumably if the legislature can by enacting *Rules of Court* enlarge the civil jurisdiction of the Supreme Court, it can do so for the County Courts and the Provincial Courts upon the strength of s. 92 (14) of the *Constitution Act, 1867*.

8. This is despite the fact that s. 3 of the *Statute of Westminster* declared only that the Parliament of the Dominion of Canada had full power to make laws having extra-territorial operation and that the section was not made applicable to the provinces. *See* Edinger, p. 60.

9. Dicey, p. 264; Castel, s. 114.

the world. The only true action *in rem* known to English law is that which lies in an admiralty court against a particular thing, namely, a ship or cargo associated with a ship. Jurisdiction in such case proceeds from attachment of the thing in the territory, and service of process on a person, though it may be necessary for purposes of notice, is not the foundation of the jurisdiction.

However, many actions *in personam* result in the status of a thing or person being changed or established against all persons though not joined in the action. The annulment or dissolution of a marriage, the dissolution of a corporation, the probate of a will, or an adjudication of bankruptcy are judgments *in rem*.[10] In such cases at common law though service was necessary on the defendants, service again was not the foundation of jurisdiction. Other bases such as the domicile of the person or the presence of the thing in the territory or the creation of the corporation in the territory were considered sufficient.[11] A judgment establishing title to or an interest in land is thus regarded as a judgment *in rem* and as being good against the whole world.

2 Actions In Personam

The common law rules of jurisdiction were procedural in character. The rules relating to service defined the limits of the court's jurisdiction. Subject to some limitations and exceptions, if a defendant had been served with process within the territory he was subject to the power of the court. Since, prior to the enactment of the *Common Law Procedure Act, 1852*, there was no power in the courts to summon absent defendants, the law was, in effect, that the plaintiff had to follow the defendant to his place of residence. The converse of this was that if the defendant could be served within the territorial limits of the court, jurisdiction was established and the fact that the defendant was not domiciled or resident there was irrelevant, as was the fact that the cause of action had no connection with the forum.[12]

The chief limitations to this rule were that service could not found jurisdiction if the issue related to foreign immov-

10. Cheshire, pp. 218-219; Ehrenzweig, pp. 80-81.
11. Gibb, Chapters V, VII, IX, XI; Nygh, p. 24.
12. Cheshire, pp. 185-186; Castel, s. 119.

ables, or to the status of persons not domiciled within the territory, or if the action was for enforcement of foreign penal or tax laws. The first main exception to the rule was that in an action *in rem* in an admiralty court, jurisdiction was acquired not by service of a person but upon the arrest of a ship.[13] The second main exception was that the court acquired jurisdiction by the submission of the defendant.[14]

D. Assumed Jurisdiction

The *Common Law Procedure Act, 1852*, gave the courts discretionary power to summon absent defendants. Thereafter the power came to be governed by the Rules of Court relating to service out of the court's territorial limits. The provisions of British Columbia Rule 13 and its predecessors were modeled upon the English rules, as were the rules relating to service *ex juris* elsewhere in the Commonwealth. The enlarged jurisdiction thus conferred by the Rules of Court was to be assumed at the discretion of the court. While service within the territorial limits conferred jurisdiction on the court, service outside the territorial limits offered jurisdiction which the court could decline to exercise, either by refusing leave, where leave was required, or by setting aside service, where leave was not required.[15]

E. Declining Jurisdiction

In the course of time it became clear that when exercising a discretion in the context of an application for leave to serve out of the territory the courts would pay regard to the question whether the court was the appropriate one to try the action. This, roughly, was the doctrine of *forum conveniens*. Much the same considerations were being taken up in a different context, that is, in the context of an application to strike out or stay an action, properly commenced by service within the court's territory, on the grounds of oppression or abuse of process. It became recognized that abuse could arise because of the inappropriateness of the plaintiff's choice of forum. This, roughly, was the doctrine of *forum non conveniens*.

13. Castel, s. 118 and Chapter 23; McLeod, pp. 111-115.
14. Cheshire, pp. 254-255; Castel, s. 121; McLeod, pp. 107-109.
15. Cheshire, pp. 193-194; Castel, s. 122; McLeod, pp. 84-89.

Whether the doctrines have merged, or should be merged, is a matter of some debate,[16] which debate will be taken up in Chapter XXI.

As a generalization, however, it can be said that a court may decline jurisdiction on the ground that a more appropriate forum exists for the trial of the action. The court can, of course, decline jurisdiction for a number of other reasons.[17]

F. Recognition and Enforcement of Judgments

The gradual extension of the court's jurisdiction by amendment of the Rules of Court relating to service demanded consideration of the question whether the court's judgment over an absent defendant would be recognized and enforced in another territory. This was not a problem peculiar to cases where a defendant out of the territory was made amenable to the court's process. It was a problem even where the defendant was served within the territory, or submitted to the court's jurisdiction, but had no assets in the territory upon which execution could be levied, or was not present to have an order *in personam* enforced by attachment of his person.

Recognition of a judgment means that the issues disposed of by the judgment of a court in one territory will be regarded as *res judicata*, if sued upon or raised as a defence, by the courts of another territory. Enforcement of a judgment means that it will be given effect to in a foreign territory without the merits again being tried.

At common law the overriding essential for the effectiveness in England of a foreign judgment *in personam* was that the adjudicating court should have had jurisdiction, in the view of English law, over the defendant. The rules developed at common law were as follows:

The foreign court's judgment would be recognized where:

(1) the defendant was resident in the territory of the foreign court (and possibly that he was present there

16. Inglis; Edinger (2); Edinger (3); Cheshire, pp. 206-212.
17. *E.g.*, the existence of an arbitration clause.

when served and possibly that he was a national or was domiciled there);[18] or

(2) the defendant submitted to the jurisdiction of the foreign court.[19]

The foreign court's judgment would be enforced where:

(1) the judgment was final; and

(2) the judgment was for the payment of a fixed sum of money.[20]

The foreign court's judgment would not be recognized or enforced where:

(1) the granting court did not have valid internal jurisdiction;[21]

(2) the judgment was obtained by fraud;

(3) the judgment was contrary to the public policy of the law of the enforcing court;

(4) the judgment was contrary to natural justice; or

(5) the judgment was of a penal or revenue nature.

But otherwise no defence as to the merits of the original claim could be raised.[22]

The method of enforcement of a foreign judgment might be either by suing on the original cause of action and pleading the validity of the judgment if the action were contested or by suing on the judgment as a cause of action.

Through a series of international conventions and interprovincial reciprocal statutes in Canada, the effectiveness of a foreign money judgment has been supplemented. Such conventions and statutes typically provide for enforcement of a money judgment given in a reciprocating state not by a fresh

---

18. Whether being domiciled in or a national of the country where the judgment has been obtained is sufficient is doubtful; *see* Cheshire, pp. 351-352; Morris, pp. 111-117; Dicey, pp. 439-441, 447-448; Castel, s. 150; Nygh, pp. 79-80. Whether temporary presence is sufficient is also doubtful; *see* Morris, p. 111; Cheshire, pp. 341-342; Castel, s. 146; McLeod, p. 597; Nygh, p. 80.
19. Read, pp. 160-186.
20. Castel, ss. 159-163; Cheshire, pp. 358-361.
21. Cheshire, p. 362; Nygh, pp. 90-92; Morris, pp. 123-124; McLeod, pp. 609-611.
22. Read, pp. 273-295; Cheshire, pp. 370-376; Castel, s. 154; Manitoba Law Reform Commission. The model *Uniform Foreign Judgments Act* approved by the Commissioners on Uniformity of Legislation in Canada in 1933 embodies the common law defences. This Act has not been adopted in British Columbia. *See* Kennedy (2), pp. 144-148.

action upon the judgment but by registration. Similar conventions and statutes have applied the same system to foreign maintenance orders and access orders.[23]

Under such conventions and statutes the common law defences to an action upon a foreign judgment are typically preserved. The provincial reciprocal statutes do not give any validity to the judgments of other provinces or states which they would not otherwise have under the common law.[24]

The peculiar feature of these rules as to recognition and enforcement of foreign judgments is that in extending its jurisdiction over foreign defendants the court is frequently asserting a jurisdiction which it will deny to a foreign court when requested to enforce its judgments.

Commentary

The common law rule that no action *in personam* will lie against a defendant unless he was served with process while present in the territory precluded a plaintiff from pursuing a claim in what might be the most appropriate forum. The plaintiff was forced to follow the defendant to the forum of his residence. The enlarged jurisdiction introduced by the *Common Law Procedure Act* gave the courts discretionary power in certain cases to summon absent defendants, whether English or foreign. The Act provided, quite broadly, that service might be made out of England where the "cause of action" arose within the territory or in respect of a "breach of contract" made within the territory.[25]

Order 11 of the Rules incorporated in the *Supreme Court of Judicature Act* of 1873 enlarged in some cases and reduced in others the conditions upon which leave to serve *ex juris* might be granted.[26] The general consideration that the "cause of action" arose in England was gone and in place a list of particular conditions was set out.

Until recently this has been the pattern followed in the Commonwealth where the common law applies. The plaintiff had to fit his action into one of the listed categories or he would

---

23. In British Columbia the relevant statutes are (a) the *Court Order Enforcement Act*, (b) the *Family Relations Act*, Part 4.1, (c) the *Divorce Act*, (1985).
24. Nadelman.
25. *Common Law Procedure Act, 1852*, 15 and 16 Victoria, c. 76, ss. 18 and 19.
26. *Supreme Court of Judicature Act, 1875*, 38 and 39 Victoria, c. 77.

not be granted leave. Until recently there was no residual discretion to grant leave in appropriate cases. Instead, extensions to the list were made by rules.

Whether the extensions which were being made over the years could be categorized as cases where the "cause of action" arose in the territory or cases where the court was the "*forum conveniens*" is not clear. The concepts do overlap. In effect the rule makers were responding to perceived deficiencies and injustices in the existing rules, sometimes in response to particular bad cases and sometimes, perhaps, in response to pressure from interest groups such as injured motorists or consumers.

The virtue of making *ad hoc* extensions of jurisdiction by the rules is that they can generally be made swiftly. Rule making bodies, by and large, are not legislators looking for parliamentary time to effect reforms which do not excite great political interest. Furthermore, the rule makers can be guided in effecting reforms by matters of principle and upon consultation with interested groups. They need not wait, as the Courts must, for sporadic cases to arise in which the principles may be reconsidered by way of judicial law making.

The disadvantage of extending jurisdiction by rules relating to service is that the power to deal with the whole subject of jurisdiction does not lie within the rule making bodies. Enforcement of foreign judgments has always been considered a legislative subject and a subject upon which reciprocal treaties or legislation must laboriously be constructed. In Canada, the Uniform Law Conference is seen as the natural body to turn to in framing new rules in this area.

The further disadvantage is that the rules deal not with jurisdiction but with service and while it was well recognized that rules of service were the foundation of many of the rules of jurisdiction, it was not always clear that the rules could and perhaps should deal with the circumstances in which the common law gave jurisdiction or in which jurisdiction should be declined. In the Canadian federal context, furthermore, rule making bodies seldom, if ever, act in concert, having no machinery to do so, and often act as though they were legislating for the activities of courts in a unitary state. Consequently, the rules relating to jurisdiction have been developed in seem-

ing disregard of the effect of those rules upon persons engaged in activities across provincial boundaries.

In the following chapters an attempt will be made to describe the provisions of the common law and of the Rules of Court of the common law provinces in Canada, the United Kingdom, the States of Australia, and New Zealand. Each chapter is devoted to a head of jurisdiction which most closely describes the relationship between the courts of the territory and either the party or the thing over which jurisdiction is exercised, or the cause of action in respect of which jurisdiction is exercised. Each head will be critically examined, and proposals made as to the principles which ought to govern the exercise of jurisdiction.

A. Inter-State Jurisdiction in the United Kingdom

The United Kingdom is not generally regarded as a federal state, because there is only one legislative body with power to legislate for the entire territory. However, the United Kingdom is made up of three separate "law districts," namely, England and Wales, Scotland and Northern Ireland, and as between them, questions arise as to assumption of jurisdiction and enforcement of judgments.

Before the changes in English, Northern Irish and Scottish laws brought about by the entry of the United Kingdom into the European Economic Community, recognition was given to the fact that there were three "law districts" within the United Kingdom which required provisions as to jurisdiction and recognition of judgments separate from those applicable to foreign territories.

The *Judgments Extension Acts* of 1868 and 1882 provided for a system of reciprocal enforcement of English, Irish and Scottish judgments for debt by registration. Registration could not be challenged on the ground that the original court had no jurisdiction, either in the "international" sense or under its own jurisdictional rules, nor could the decision be challenged on its merits.[1] Similar provisions for registration of maintenance orders between the three "law districts" were made by the *Maintenance Orders Act, 1950*.

The English Rules of Court relating to service *ex juris* specifically exempted defendants domiciled or ordinarily resident in Scotland or Northern Ireland from those provisions which extended jurisdiction in cases involving the enforcement of or damages for breach of contract.[2] There is no power to allow service of a writ *ex juris* in such cases.

Furthermore, on an application for leave to serve a writ in Scotland or Northern Ireland the court was empowered to

1. Anton, pp. 593-596. The only exception was that the jurisdiction of a Scottish court based upon arrestment would not be recognized in English and Irish courts.
2. *See* R.S.C. 1965, Order 11, Rules 1(1)(f) and (g). For an explanation as to the exemption of Scottish and Northern Irish residents from this head of jurisdiction and for a history of the Rule *see* Gibb, pp. 27-35 and *see John Russell and Co.* v. *Cayzer, Irvine and Co.*, [1916] 2 A.C. 298 (H.L.) and *Lenders* v. *Anderson*, (1883) 12 Q.B.D. 50.

decline to grant leave if a concurrent remedy was available in those locations and having regard to the comparative cost and convenience of proceeding there or in England.[3] It is significant that as between the three "law districts" of the United Kingdom a doctrine akin to *forum non conveniens* was introduced by the rules in recognition of the fact that the three "law districts" are part of one political state and that different considerations apply to questions of jurisdiction where residents of the other "law districts" are involved than those which apply to foreign residents.

With these exceptions, the English rules as to assumption of jurisdiction are the same whether the defendants are resident within another "law district" of the United Kingdom or are resident out of the United Kingdom.

The Scottish rules as to jurisdiction differed markedly from the English rules.[4] Generally, in Scottish law, jurisdiction in personal actions may be founded on the defender's residence, but not presence, in Scotland, or upon his ownership of "heritage" in Scotland, that is to say, immovable property or an interest therein, or upon the arrest of movable property, or where the cause of action arose in Scotland and personal service has been effected in Scotland. The plea of *forum non conveniens*, which is a doctrine originating in Scottish law and not found in other civil law systems, may be given effect to "whenever it can be shown that the case cannot, consistently with fairness and justice, be tried in Scotland." The plea is available not only where a defender is served out of the territory but also where the court has jurisdiction over the defender upon any basis recognized by Scottish law.

Consequent upon the accession of the United Kingdom to the European Economic Community Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (on the 27th of September, 1968), the principles of jurisdiction were re-examined in both England and Scotland. In the words of the authors of the Scottish report,[5]

> We are convinced that if intolerable confusion in our law and procedure is to be avoided such legislation must go further

3. R.S.C. 1965, Order 11, Rule 4(3). *See The Supreme Court Practice (1985)*, ss. 11/4/6 and 7.
4. Anton, Chapter 5; Gibb, Chapter 3.
5. *Report of the Scottish Committee on Jurisdiction and Enforcement* (1980). The chairman was the Honourable Lord Maxwell.

> than implementing the convention. In particular it must, in our view, introduce a comprehensive reform of our rules of civil jurisdiction generally and it must reform the procedure for enforcement of judgments as between different parts of the United Kingdom.

The "intolerable confusion" referred to would have arisen in part from the fact that there would be in effect three different regimes concerning jurisdiction, namely:

(1) a regime in respect of defendants residing within the European Economic Community

(2) a regime in respect of defendants residing in England or Northern Ireland, and

(3) a regime in respect of defendants residing elsewhere.

Accordingly, as between the three components of the United Kingdom the solution adopted was to apply the convention rules as far as possible to defendants in other "law districts" within the United Kingdom.[6]

For Scotland, this meant the abandonment of several grounds of jurisdiction peculiar to Scotland, *e.g.*, attachment to found jurisdiction; jurisdiction over natural persons based on having their place of business in Scotland; jurisdiction over persons who own immovable property in Scotland; jurisdiction in contract based on the place where the contract was made; and jurisdiction to determine rights of ownership or possession of immovable property in Scotland.

For England and Northern Ireland, this meant the abandonment of jurisdiction based upon service within the territory and the substitution of domicile as the principal ground of jurisdiction.

The only grounds upon which an English court may now take jurisdiction over a defendant domiciled in Scotland or Northern Ireland are those set out in Sections 2, 4, 5 and 6 of Schedule 4 to the *Civil Jurisdiction and Judgments Act, 1982*.

One of the few changes made in the jurisdictional rules applying to proceedings in England or Northern Ireland against a foreign defendant not domiciled in a convention country is found in section 30 of the *Civil Jurisdiction and*

---

6. Hartley, p. 42; Schedule 4 of the *Civil Jurisdiction and Judgments Act, 1982* (England and Ireland) and Schedule 8 (Scotland).

Judgments Act, 1982. It provides that jurisdiction is extended to entertain proceedings for trespass to, or any other tort affecting, immovable property where the property in question is situated outside the United Kingdom. This section overcomes the decision in *British South Africa Company* v. *Companhia De Mocambique*[7] in which the House of Lords held that English courts have no jurisdiction to hear an action for damages for trespass to foreign land.

B. Inter-State Jurisdiction in the European Economic Community

Upon joining the European Economic Community in 1973, the United Kingdom acceded to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.[8] By the Accession Convention adjustments were made to the original Convention to adapt the Convention to the common law system and to take account of the fact that the United Kingdom is made up of three "law districts."

The Convention was necessary to enable the Community to operate as an economic unit, since to do so it had, to a certain extent, to operate as a legal unit. In particular, judgments given in one country of the Community in commercial and civil matters had to be recognized in another so that a national of one country doing business or working in another country should not feel lacking in legal protection or discriminated against in the courts of that country.[9] However, the Convention went much further than establishing common rules for recognition of judgments. It contains jurisdictional rules which are binding on all courts and are applicable at the judgment-granting stage. A court of the United Kingdom cannot hear a case covered by the Convention unless it has jurisdiction over the defendant in terms of those rules. Since the rules of jurisdiction are enforced at the stage of judgment-granting, it was possible to eliminate them almost entirely at the stage of recognition and to require that the contracting states give almost automatic recognition to judgments covered by the Convention. Enforcement procedures were thus made

7. [1893] A.C. 602.
8. There are three instruments making up the Convention which are set out in section 1(1) of the *Civil Jurisdiction and Judgments Act, 1982.*
9. For material dealt with in this section, *see* Hartley; Black; Kaye.

very easy. The procedures are based on registration, but the defendant cannot, since all jurisdictional rules are now common, resist enforcement on the ground that the foreign court lacked jurisdiction.

The Convention covers civil and commercial matters. Excluded are matters involving:

(1) The status or legal capacity of natural persons;

(2) Rights in property arising out of a matrimonial relationship;

(3) Wills and succession;

(4) Bankruptcy and winding up;

(5) Social security and arbitration;

The basic rules of jurisdiction now enforced in the United Kingdom in consequence of accession to the Convention and the passing of the *Civil Jurisdiction and Judgments Act, 1982* apply not only to persons domiciled in the Community but also to persons domiciled in the several parts of the United Kingdom.

The Act recognizes the following bases of jurisdiction over a defendant:

(1) Connection between the territory of the forum and the defendant. In the Convention this is called "general jurisdiction."

(2) Connection between the territory of the forum and the cause of action. In the Convention this is called "special jurisdiction."

(3) Connection between the territory of the forum and the subject matter of the action. In the Convention this is called "exclusive jurisdiction."

1. "General Jurisdiction"

(a) Domicile

The basic jurisdictional provision is that the courts of the defendant's domicile have jurisdiction. Accordingly, the first thing that an English court must do is to determine the defendant's domicile. If he is domiciled in England the court's juris-

diction is established. If he is not domiciled in England, the court must decide if he is domiciled in another contracting state including Scotland and Northern Ireland. If he is, the court may take jurisdiction only if it is entitled to do so under the rules relating to special jurisdiction. If the defendant is not domiciled in any contracting state, the ordinary rules of English law will apply to determine the court's jurisdiction.

The Convention specifically prohibits jurisdiction being exercised upon the basis of service of the writ in the territory or the presence of property in the territory or the attachment of property in the territory.

There is no definition of domicile in the Convention. The courts of each state apply their internal law to determine domicile. However, sections 41 to 46 of the *Civil Jurisdiction and Judgments Act, 1982* prescribe tests for domicile which are closer to the idea of ordinary residence than the English concept of domicile as a "permanent home."

Under the Act, an individual is domiciled in the United Kingdom if, and only if:

(1) he is resident in the United Kingdom, and

(2) the nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom.

There is a rebuttable presumption that the test under (a) is satisfied if the individual has been resident in the United Kingdom for the last three months or more.

If the defendant is not domiciled in the United Kingdom the question whether he is domiciled in another contracting state is determined by applying the law of that state. If the defendant is not domiciled in the United Kingdom or in another contracting state, the question whether he is domiciled in a foreign country is determined by applying the above tests.

An individual may also be domiciled in the United Kingdom if he has a dependent domicile (*e.g.*, a minor or a married woman). Whether this is so is determined according to the laws of the state of which he is a national.

The rules for determining the domicile of corporations and associations are set out in the Act.

A corporation or association is domiciled in the United Kingdom if:

(1) it was incorporated or formed under the law of a part of the United Kingdom and has its registered office or some other official address in the United Kingdom, or

(2) its central management and control is exercised in the United Kingdom.

Furthermore, in determining in which "law district" of the United Kingdom a corporation is domiciled a further test is introduced, namely:

(3) it has a place of business in that part, that is to say, a branch, agency or other establishment.

Special provisions are also made for the determination of the domicile of trusts.

(b) Submission

The court also has jurisdiction where the parties have chosen the court as the forum.

2. "SPECIAL JURISDICTION"

As to special jurisdiction, the courts may take jurisdiction over a defendant not domiciled in the territory in various cases where the cause of action arose in the territory.

(a) Contract

In matters relating to contract, the courts for the place of performance of the obligation in question have jurisdiction.

(b) Tort

Jurisdiction is given to the courts of the place where the "harmful event" has occurred. This has been interpreted by the European Court to mean that both the courts of the territory where the defendant acted and of the territory where the harm occurred have jurisdiction.

(c) Injunctions

In the case of a threatened wrong, the courts for the place where the "harmful event" is likely to occur have jurisdiction.

(d) Multiple Defendants

Claims against multiple parties, third parties and counter-claims may be adjudicated by the court if it has jurisdiction over one defendant.

(e) Property

Within the United Kingdom, but not elsewhere in the European Economic Community, proceedings concerning a debt secured on immovable property or proprietary or possessory rights over movable property or rights of security over movable property or authority to dispose of movable property may be heard by the courts of the part of the United Kingdom in which the property is situated even where the defendant is domiciled in another part of the United Kingdom.

(f) Insurance and Consumer Contracts

Insurance and consumer contracts are dealt with as being areas of special jurisdiction. In general, where an insurance or a consumer contract is the basis of the proceeding, jurisdiction is extended both to the courts of the plaintiff's residence and the courts of the defendant's residence, and provision is made that the parties may not contract out of these provisions unless they do so after the dispute has arisen.

3. "Exclusive Jurisdiction"

From the provisions relating to general jurisdiction and special jurisdiction there are exceptions. Exclusive jurisdiction is given over rights *in rem* and tenancies in immovable property to the courts of the contracting state in which the land is situated. The constitution or dissolution of corporations or associations is another category in which exclusive jurisdiction is given to the contracting state in which the corporation or association has its "seat." The courts of a contracting state furthermore have exclusive jurisdiction in proceedings in which a judgment is to be enforced within the territory.

Commentary

The relationship between the United Kingdom and the other member states of the European Economic Community is a special one, having little in common with the relationship between the provinces of the Canadian federation. The same is true about the relationship between the constituent parts of the United Kingdom. The necessity for giving effect to the provisions of a Convention creating economic ties with few political ties, has led the United Kingdom to depart quite radically from the principles of the English common law and of Scottish law and to adopt rules of jurisdiction more akin to the rules of the civil law.

Nevertheless there is much to be learned from the system now in force in the European Economic Community, and from the efforts of the English and Scottish Commissioners to adapt their rules to the reality of a free trade union between politically independent states.

The Scottish Commissioners took the opportunity to completely revise their general rules on jurisdiction and to abandon positions inconsistent with modern day needs. The English Commissioners took the opportunity of effecting lesser reforms in their own general rules by way of statute.

Where the principles upon which the Convention was based were similar to those already recognized by common law or Rules of Court, the United Kingdom statute defines such principles more fully and clearly.

In the succeeding chapters reference will be made to some of these statutory provisions which might usefully be considered as a guide to reform in British Columbia.

C. Inter-State Jurisdiction in Australia

The Australian system of jurisdiction is unique. As regards jurisdiction over persons and things outside of Australia, each state court and the federal court have rules as to service *ex juris* and reciprocal enforcement of judgment statutes which are similar to those found in Canada and other common law countries.[10]

10. An instructive review of such provisions in the common law countries of the Commonwealth is provided in the report made by Professors McClean and Patchett *(cont.....)*

As between the Australian states, however, a different regime has been in existence almost since the founding of the Commonwealth of Australia. The Australian Constitution provides that Parliament has power to make laws as to the recognition of judgments of one state by another and for the service and execution of process and judgments of the courts of the states.[11] Pursuant to these powers, Parliament enacted the *Service and Execution of Process Act* of 1901.[12]

The results can be summarized as follows:[13] Under Section 4, service without leave may be made upon a defendant in any part of Australia. Hence, in actions *in personam* the court acquires jurisdiction over any person present in Australia when served. Section 11(1) of the Act, however, provides that if a defendant though duly served out of the state's territory fails to appear or submit to the court's jurisdiction, then the plaintiff before proceeding to take default judgment must establish that the action falls into one of the categories in paragraphs (a) to (f) of section 11(1). Broadly speaking, the categories are as follows:

(1) Actions involving disputes over real or personal property in the territory;

(2) Actions for breach of contract made in the territory or breached in the territory;

(3) Actions in tort where the act for which the damages are claimed was done within the territory;

---

10. *(...cont.)* to the Commonwealth Secretariat entitled "The Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth" presented at the Commonwealth Law Ministers Meeting in Winnipeg in August, 1977. Draft model legislation has been presented to subsequent meetings in St. Kitts and Apia, Western Samoa.

11. Section 51(xxiv) and (xxv) of the Australian Constitution provides that

> The Parliament shall...have power to make laws...with respect to (xxiv) the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the states, and (xxx) the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States.

12. Part II of the *Service and Execution of Process Act* of 1901 provides in Section 4 that

> (1) a writ of summons issued out of, or requiring the defendant to appear at, any court of record of a state or part of the Commonwealth may be served on the defendant in any other state or part of the Commonwealth.
>
> (2) Such service may, subject to any *Rules of Court* which may be made under the Act, be effected in the same manner as if the writ was served on the defendant in the state or part of the Commonwealth in which the writ was issued.

13. Pryles, s. 1.2; Nygh, Chapter 4, pp. 52-56.

(4) Actions in which an injunction is sought to restrain anything done or to be done within the territory;

(5) Actions in which, at the time when the liability sought to be enforced against the defendant arose, he was within the territory.[14]

The relationship between section 4, which grants unlimited jurisdiction and section 11, which restricts jurisdiction in the absence of submission, is complex. No defendant can argue that service upon him was improper, even if the situation in respect of which the writ was issued did not fall within section 11. He can, however, enter appearance conditionally and argue that the court should not give judgment in default of submission to the court or, he can do nothing and hope that the absence of the jurisdictional elements specified in section 11 will appear from the plaintiff's evidence.[15] Under section 11 the court has a discretion to allow the plaintiff to proceed if his action falls within one of the categories but, significantly, the courts have not often refused leave on the ground of *forum non conveniens*, though it is a principle applied in exercising discretion where a plaintiff applies for leave to serve out of Australia.[16]

As to the recognition and enforcement of judgments of sister-states, the procedure for a purely administrative registration of judgments under the Act does not seem to allow a challenge to the jurisdiction of the court giving the judgment or to the merits of the judgment, provided that registration takes place within twelve months, after which leave must be obtained. In such a case a court may question the jurisdiction of the original court in determining whether to grant leave to register. Otherwise, the enforcing court may order a stay of proceedings to enable the judgment debtor to take proceedings to set aside the judgment in the territory where the original judgment was given. The registration court, cannot, however, readjudicate upon substantive defences.[17]

A third element in the Australian Constitution which is unique is that original jurisdiction (referred to as its "diversi-

14. This last provision seems to duplicate some of the previous provisions if "liability" can be equated to "cause of action". There are apparently no reported cases in which the scope of section 11(1)(e) has been argued. *See* Pryles, p. 26.
15. Pryles, s. 1.5; Nygh, pp. 56-58.
16. Nygh, p. 58; Cairns, pp. 66-67.
17. Pryles, s. 2.3; Read, pp. 301-305.

ty" jurisdiction) is conferred upon the High Court of Australia in all matters between residents of different states.[18] This diversity jurisdiction is similar to that given to the Federal District Courts of the United States and is subject to the same criticisms by Australian commentators as have been frequently expressed by American commentators.[19] Unlike the Federal District Courts in the United States, the High Court of Australia is basically a court of appeal and the invocation of its original jurisdiction is unwelcomed. The original justification for the High Court's diversity jurisdiction rested solely on the convenience of nationwide service of process and execution of judgments in disputes between residents of different states. But the procedures set up by the *Service and Execution of Process Act* for state courts take care of most of these difficulties. The corresponding disadvantages are the wastage of resources where simple actions are litigated at first instance and the difficulties in applying state laws, including conflict of laws rules, in High Court actions. The High Court has done much to discourage invocation of its original diversity jurisdiction in the past by, for example, excluding corporations and by invoking a *forum non conveniens* doctrine and by withholding costs from successful plaintiffs.[20] More recently, in 1976, the *Judiciary Act* was amended to allow the High Court the means of ridding itself of this embarrassment. The court may now of its own motion remit a case to any federal or state court that has jurisdiction over the subject matter and the parties. The principle that the court follows in remitting cases is that of *forum conveniens*.[21]

Commentary

From a Canadian perspective there may be much to be learned from the Australian experience. While in Canada there is no federal statute with potential to remove all the problems encountered in the Canadian federation in regard to assumption of jurisdiction or enforcement of judgments, there has been for many years a Uniform Law Conference which has been actively working to achieve some of the same ends by means of uniform provincial legislation. There is no court in

18. Section 75(iv); Nygh, p. 48.
19. Pryles, ss. 4.1, 4.6; Swan, p. 283, note 55.
20. Nygh, pp. 48-49.
21. Nygh, pp. 49-51.

Canada with original jurisdiction in diversity cases but, unless it can be assumed that the mere possibility of the Australian High Court taking over the field has encouraged the state courts to behave reasonably and in the interests of all Australians, it does not seem that this feature of the Australian Constitution has had much effect upon the practical issues faced by state courts and legislatures in this context.

The Australians appear to have arrived at a more satisfactory solution for the enforcement of judgments than the Canadian provinces. Under the Full Faith and Credit clause of the Constitution, one state must recognize and enforce the judgments of sister states. If the defendant has not submitted to the jurisdiction it is for the court of the forum to decide whether judgment should nevertheless be entered under one or other of the provisions of the statute. But once that decision is made, it cannot be questioned by the registering court.[22] Furthermore, it is not only money judgments that must be recognized and enforced.

The provisions of Canadian provincial Reciprocal Enforcement of Judgments statutes allow defences to be raised to registered judgments, including:

(1) lack of jurisdiction;

(2) lack of due service and lack of submission;

(3) fraud;

(4) lack of finality;

(5) public policy;

(6) a good defence if an action were brought on the original judgment.

These defences are either denied or circumscribed in Australia. The Canadian statutes are, in truth, merely administrative and are in no sense statutes giving full faith and credit to the judgments of sister provinces. In particular, judgments rendered in reliance upon the extended jurisdiction given by the provincial Rules of Court by way of service *ex juris* rules will not be recognized in other provinces, unless they happen to fall within the narrow band of judgments which would be

22. Pryles, pp. 74-84; Nygh, pp. 109-114. The position, however, is not altogether certain: Fine; Pryles (2).

recognized at common law. In Australia recognition is, in effect, granted on the basis of the "long-arm" provisions of the *Service and Execution of Process Act.*

In effect, the list of conditions in the Australian statutes under which a default judgment may be given is an enumeration of the circumstances under which a state may, effectively, exercise "long-arm jurisdiction," since if the defendant having been served, submits, no question of jurisdiction will arise. If he does not, the extent of each state court's jurisdiction is established by the statute since knowing that a judgment given in default will be effective everywhere in Australia, the defendant must either submit or give up his opportunity to defend on the merits.

D. Inter-State Jurisdiction in the U.S.A.

It might be expected that a comparison of the rules as to jurisdiction in the United States with those of Canada would reveal significant similarities. Each country is a federal union governed by a written constitution which delimits the powers of the constituent states and the powers of the federal state. Each must face the same problems in the field of international and inter-state assumption of jurisdiction and of recognition of judgments. One would expect similar solutions. However, any inquirer from a common-law country of the Commonwealth will immediately find himself in strange territory. He will be struck by the fact that the subject of jurisdiction is not dealt with as an aspect of civil procedure, nor as an aspect of conflict of laws. The subject is, almost entirely, dealt with as an aspect of American constitutional law. Principles are derived from the Constitution. Solutions to what are essentially inter-state jurisdictional problems are assisted, or more often hampered, by the provisions of the Constitution. The Supreme Court of the United States, by its judgments in constitutional cases, dominates the field.

This situation comes about because of two constitutional provisions, the "Full Faith and Credit" clause and the "Due Process" clause, neither of which are found in the Canadian constitution.

The Full Faith and Credit clause[23] and its derivative federal statute appears to require each state to recognize and enforce the judgments of each other state. But this is not so. The clause prevents relitigation in the courts of one state of the merits of the dispute resolved by a final judgment in a court of another state, but it was early on held that no state was required to enforce a judgment of the court of another state if the court rendering the judgment lacked jurisdiction.[24] The question then to be faced was, what were the limits upon the jurisdiction of each state?

The answer was found in the "Due Process" clause.[25] In *Pennoyer* v. *Neff*,[26] the Supreme Court of the United States held as "a principle of general, if not universal law" that the only legitimate bases for exercise of jurisdiction were

(1) consent, (*i.e.*, submission by the defendant to the court's power);

(2) presence (*i.e.*, personal service of the defendant within the court's territory);

(3) domicile (*i.e.*, residence of the defendant within the court's territory);

(4) presence of property (*i.e.*, in respect of actions *in rem*, the presence of real property within the territory which is the subject of the action, or of other property which has been seized or attached).

It was held that the courts of the state asked to enforce a judgment of the courts of another state must decline to do so not only where the "traditional" grounds of jurisdiction were absent, but where the judgment of the rendering court was itself constitutionally invalid. From this latter conclusion it followed that the invalidity affected judgments not only against

23. The "Full Faith and Credit" clause in Article IV, section 1, reads as follows: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof". In 1770 the Congress adopted the *Full Faith and Credit Statute* (now 28 U.S.C. s. 1738) which provides that "such Acts, Records and Judicial Proceedings...shall have the same full faith and credit in every court within the United States...as they have by law or usage in the courts of such State...from which they are taken."

24. Casad, s. 2.10.

25. The "Due Process" clause is found in the Fourteenth Amendment which reads in part "...nor shall any State deprive any person of life, liberty, or property, without due process of law."

26. (1878) 95 U.S. 565; *see* Casad, s. 2.02[1] to 2.02[3].

defendants in other states but also against defendants in other countries.[27]

In effect the judgments in *Pennoyer* v. *Neff* froze what were conceived of as being the common law principles of the time as the only constitutionally permissible principles of jurisdiction, which nothing short of a constitutional amendment could alter. The gradual statutory extensions of jurisdiction to meet modern needs which took place in the Commonwealth common law countries were prohibited in the United States. What was conceived of as the "principle of power"[28] dominated American theories of jurisdiction for the next seventy years. The debates and the litigation in the field turned upon the issues of what was "presence," what was "residence," and what was "submission," especially in the case of corporate defendants, where such concepts were difficult of application. It was held, for example, that corporations and persons who "did business" in the state were present or resident. It was held that motorists using the highways of the state had "consented" to jurisdiction for claims arising out of such use.

In 1945 the Supreme Court in *International Shoe Company* v. *State of Washington*[29] departed from the "power" theory of jurisdiction and enunciated new principles which gave the opportunity to the states to assert what has come to be known as "long-arm jurisdiction." The court held that a state could exercise jurisdiction where the defendant had "certain minimum contacts with it, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." What is to be considered "minimum contacts" and what is to be considered "fair play and substantial justice" are questions which have engaged the courts ever since.[30] Each state has its own rules as to jurisdiction, some of which reach the borders of constitutional propriety and some of which lie well back from what is permissible. In 1963, the Commission on Uniform State Laws put forward a model stat-

27. The Full Faith and Credit clause does not require recognition or enforcement of "foreign" judgments but U.S. courts generally treat foreign judgments upon the same standards as sister state judgments. In consequence, recognition or enforcement of foreign judgments which violate due process, as conceived of by the American courts, will itself be held to be a violation of due process by the recognizing forum and hence invalid. *See* Hertz, pp. 10-11.

28. A phrase from Mr. Justice Holmes' judgment in *McDonald* v. *Mabee*, (1917) 243 U.S. 90 that "the foundation of jurisdiction is physical power" was much quoted. *See* Ehrenzweig, pp. 77-79; Ehrenzweig (2) pp. 296-300; Casad ss. 2.02[2] and [3].

29. (1945) 326 U.S. 310; *see* Casad ss. 2.02[4] to 2.05.

30. *See, e.g., World-Wide Volkswagen Corp.* v. *Woodson*, (1980) 444 U.S. 286.

ute, the *Uniform Interstate and International Procedure Act*, but few states have adopted it entirely and many states have gone beyond it.[31] The Wisconsin Statute is generally acknowledged as being the most comprehensive enactment of jurisdictional principles within the constitutional limits.[32]

But even the new freedom granted under the *International Shoe* formulation of what is "due process" does not enable the state to do anything more than enlarge the circumstances in which a defendant may be said to be "present." The fact that the cause of action arose in the state, or the fact that the state's courts might be the appropriate forum, are not grounds for exercising jurisdiction over an absent defendant. On the other hand, the fact that the defendant has some minimum contact with the state is sufficient to grant jurisdiction regardless of where the cause of action arose. Jurisdiction may, however, be declined on the ground that the state's courts are not the appropriate forum.[33]

Commentary

The conclusion is inevitable, that the American model is not a suitable one to follow. "Due process" is not a concept developed in the common law countries of the Commonwealth and the jungle of American decisions on the issue of due process is almost trackless. If there are any limitations imposed by our constitution upon the exercise of extra territorial jurisdiction by a province, they are not limitations which resemble those imposed by the American Constitution and are unlikely to be invoked so as to cripple the provinces in their efforts to arrive at jurisdictional rules which meet modern day needs.

---

31. *See* Casad, Appendix A-1.
32. *See* Casad, Appendix A-99.
33. This general statement must be qualified. The doctrine of *forum non conveniens* is recognized in some states, rejected in others and generally is not well developed. *See Essays on Civil Procedure*, pp. 1008-1013; and James, s. 2.31.

A. "Presence" of Natural Persons

The common law approach was that the court would exercise jurisdiction where its process was served on the defendant within its territory. Personal service was generally required, though substituted service was sufficient if the defendant was in the territory but could not be served personally.[1]

Provided service is effected in the territory, the nationality, domicile or residence of the defendant is irrelevant, and where the cause of action arose is irrelevant. The jurisdiction founded upon service can be invoked by any person in the world against any person in the world.[2]

In consequence, jurisdiction will be exercised over a person who is in the territory when the writ is served (or perhaps when the writ is issued) only as a transient and regardless of the intended duration or purpose of his stay.[3]

Commentary

This rule of common law has attracted persistent criticism and it has been doubted that the cases usually cited as authority for the rule support it.[4] Nevertheless the rule has in modern times been confirmed by the English Court of Appeal and the High Court of Australia.[5] It is, however, difficult to find an example in modern times of jurisdiction being exercised over a transient solely on the grounds of service in the territory. Generally there is some further connection.

The application of the "transient jurisdiction" rule has been said to offend against principles of comity with foreign nations, especially those in civil law countries where, general-

---

1. Cheshire, pp. 185-187; Dicey, pp. 288-293; McLeod, pp. 80-81; Castel, s. 119. The rule is the same in Quebec, *see* Johnson, pp. 1012, 1023-1024.
2. With exceptions, such as the plaintiff enemy alien and the defendant diplomat; *see* McLeod pp. 64-78.
3. Nygh, pp. 25-26; Ehrenzweig (2). *See, e.g., Forbes* v. *Simmons*, (1914) 20 D.L.R. 100 (Alta. S.C.).
4. Ehrenzweig (2); 9 Journal of Public Law; Read, pp. 149-151; Nadelman, p. 83; Dodd; Casad, s. 2.04[2][c]; Inglis, p. 391; *Uniform Law Conference*, 1933, p. 83.
5. *Colt Industries* v. *Sarlie*, [1966] 1 All E.R. 673, 676 (Q.B); *Maharanee of Baroda* v. *Wildenstein*, [1972] 2 Q.B. 283(C.A.); *Laurie* v. *Carroll*, (1958) 98 C.L.R. 310 (H.C.); for British Columbia, *see Macaulay* v. *O'Brien*, (1897) 5 B.C.R. 510 (S.C.); *Parshley* v. *Hanson*, (1912) 2 W.W.R. 868 (B.C. S.C.); *Butkovsky* v. *Donahue*, (1984) 52 B.C.L.R. 278 (S.C.); for Newfoundland, *see Doyle* v. *Doyle*, (1974) 52 D.L.R. (3d) 143 (Nfld. S.C.); for Alberta, *see Forbes* v. *Simmons*, (1914) 20 D.L.R. 100 (Alta. S.C.).

ly, jurisdiction over transients is not claimed.[6] The rule has recently been abandoned in the United Kingdom in respect of residents of a member state of the European Economic Community and, more significantly, in respect of Scottish and Northern Irish residents.[7]

The historical explanation for the rule is that, formerly, power over a defendant could only be obtained by attaching his person to bring him before the court. At one point in the English legal system most major lawsuits were commenced by arresting the defendant under the writ of *capias ad respondendum*. The defendant would be released from custody only if he posted a bond to secure the judgment. The actual presence of the defendant was essential because of the methods of trial, *e.g.*, trial by oath or by ordeal. When personal service replaced arrest as the means of initiating a suit, the concept that the defendant had to be within the physical power of the court before judgment could go against him survived the change. Service on a defendant notionally put him within the power of the court.[8] In the absence of any power to serve out of the territory, it was important to maintain the principle that service itself vested jurisdiction, even over a transient, because in no other way could actions against foreign defendants be initiated.[9] This assertion of jurisdiction over persons who have no other connection with the territory was justified upon the basis of "power" or "allegiance."[10]

However two developments have occurred which make these theories obsolete. Firstly the creation of the court's "long-arm" jurisdiction by the *Common Law Procedure Act* and the Rules of Court means that power or allegiance are no longer an essential foundation of jurisdiction.

Secondly, the development of the doctrine of *forum non conveniens* (or abuse of process) made it clear that whatever power the court had over a transient defendant was only symbolic and that if the real power resided in a foreign forum to

---

6. Gibb, pp. 14-21; *Essays on Civil Procedure*, pp. 915-916; Inglis, p. 391.
7. *Civil Jurisdiction and Judgments Act, 1982*, Schedule 4; *see* Black, p. 4.
8. Casad, s. 2.02 [2]; Nygh, p. 25.
9. *Essays on Civil Procedure*, pp. 915-916, 937-938.
10. "The foundation of jurisdiction is physical power." Holmes J. in *McDonald* v. *Mabee*, (1917) 243 U.S. 90; *see* criticism of this concept by Ehrenzweig (2), pp. 296-300. As to allegiance as the foundation, *see Colt Industries* v. *Sarlie*, *supra*, n. 5.

which the parties ought to go, then jurisdiction should not be exercised.[11]

Is there any justification for retaining the common law rule that jurisdiction may be founded upon service upon a transient defendant?

There may be two justifications for retaining the rule in some form.

(1) There may be peculiar circumstances in which the court should assert jurisdiction over a transient defendant and in particular should do so where the plaintiff has no other forum in which he can realistically expect to obtain relief.[12]

(2) The rule is at least certain and perhaps the most certain of all the rules relating to jurisdiction. Were jurisdiction to be confined to persons who are domiciled or resident in the territory the arbitrary aspects of the present rule would disappear. However, domicile and residence are not concepts which are entirely clear and the factual basis for either may be unknown to the plaintiff. At least practitioners know that there is one jurisdiction in the common law world in which a plaintiff can commence his action as of right and that is the jurisdiction in which the defendant can be found and served. The plaintiff faces little danger that his case will fall between jurisdictional cracks since, if the transient defendant is willing to submit to some other more appropriate jurisdiction, the court will generally stay the original proceeding and it can be revived if the defendant fails to submit.

---

11. *See* Inglis, pp. 386-392; Cheshire, pp. 185-186, 342.

12. For example, in *Oppenheimer* v. *Louis Rosenthal & Co.*, [1937] 1 All E.R. 23 (C.A.), the plaintiff was a German national of the Jewish faith employed in England as an agent of a German company. He sued for wrongful dismissal. Application for leave to serve *ex juris* was sought and the argument against granting leave was that Germany was the *forum conveniens*. The plaintiff contended that being of the Jewish faith he was prohibited in Germany from engaging the services of a lawyer and was in danger of being deprived of his liberty should he go there. Even if the case had been that both the plaintiff and the defendant were transients and service had been effected in the territory it would be hard to find a more compelling set of circumstances to justify the court in taking and retaining jurisdiction over the defendant. *See also Ellinger* v. *Guiness, Mahon & Co.*, [1939] 4 All E.R. 16 (Ch.) where a contractual stipulation that the courts of Germany had jurisdiction was not enforced for much the same reasons. In *Perkins* v. *Benguet Consolidated Mining Co.*, (1952) 342 U.S. 437, the state where the head office of the defendant company was situated was occupied by an enemy, but an officer was served in Ohio. In *Macaulay* v. *O'Brien*, *supra*, n. 5 the defendant served in British Columbia was resident in the Yukon but there were no civil courts in the Yukon and British Columbia was the nearest place where the plaintiff could litigate his rights.

Although in theory it is offensive that jurisdiction should be asserted over a defendant passing through or over the court's territory[13] in practice no great harm would be done provided that the courts were able to decline jurisdiction in such cases by the application of the doctrine of *forum non conveniens*. But Canadian courts do not apply this doctrine. Instead, they are compelled to ask the question whether the proceeding is oppressive.[14] The appropriateness of this test is discussed in Chapter XXI.

It seems proper that a court should retain some discretion to assume jurisdiction where the defendant is present and can be served within the territory and there is no other appropriate forum to which the plaintiff can turn. This suggestion is, therefore, incorporated into Principle 26 discussed in Chapter XX.

B. "Presence" of Artificial Persons and Partnerships

The rule that personal service in the territory vests jurisdiction raises the question, what in the case of a corporation or a partnership is the analogue of the physical presence of an individual?

At common law a corporation could be treated as being present in the territory if it carried on business therein by an agent. If an agent in the territory had authority to enter into transactions binding the artificial person and operated at a fixed place and for a definite period of time, the corporation would be held to be present in the territory and capable of being served there by service on the agent.[15]

Under the Rules of Court and statutes, a corporation, whether domestic or foreign, could be served in the territory (and jurisdiction obtained consequently) by serving (a) a director or officer or agent in the territory, (b) by serving the corporation at its registered office in the territory or (c) by serving

13. Jurisdiction over a foreign defendant served while attending the Ascot races was retained in *Maharanee of Baroda* v. *Wildenstein*, *supra*, n. 5. Jurisdiction over a foreign defendant served while flying in a commercial aircraft over Arkansas was accepted in *Grace* v. *MacArthur*, (1959) 170 F. Supp. 442 (E.D. Ark.).

14. *See* Edinger (2) and (3); but the position in England may now be different, *see* Cheshire, pp. 185-186, and Chapter XII. The position in British Columbia also seems to have been altered by the decision of the British Columbia Court of Appeal in *First City Investments* v. *Shrum, Liddle & Hebenton*, (1988) 26 B.C.L.R. (2d) 46.

15. Cheshire, p. 188; Dicey, pp. 294-297; McLeod, pp. 83-84.

a person who transacts or carries on any business for the corporation in the territory.[16]

As to partnerships, service on any partner in the territory is sufficient to found jurisdiction and service upon a person appearing to manage or control the partnership business at a place of business of the firm in the territory is also sufficient.[17] Consequently, jurisdiction may be gained over the partnership by serving an itinerant partner, though jurisdiction over the partners themselves can only be gained by service on a partner in the territory and by service *ex juris* on partners out of the territory who are "proper parties to the action."[18]

Commentary

If a corporation is incorporated under the laws of the forum, or is a foreign company which has a registered address for service under the laws of the forum, it is clearly proper to treat the corporation as though it were "present" in the territory. So too, if the corporation has a place of business there, or an agent who carries on business generally there (as opposed to entering into a transaction which gives rise to the proceeding).[19] But the Rules allow service upon an itinerant director or agent of a corporation which has no connection with the territory. Similarly, an itinerant partner might be served in the territory. If a corporation, which has otherwise no connection with the territory, happens to have a director resident in the territory, jurisdiction can be gained over the corporation by service upon the director.

The same objections therefore apply to "presence" as a basis for jurisdiction over corporations and partnerships as apply in the case of natural persons.

Jurisdiction should be founded upon some real connection with the territory, and it would be better to define that connection in terms of "residence" rather than "presence."

---

16. *E.g.*, B.C. Rule 11 (2)(b); Alberta, Rule 20; Ontario Rule 16.02(1)(c); B.C. *Company Act*, ss. 228(1) and (2). For a list of other artificial persons upon which service may be made in the same manner as on a company, *see* Fraser, chapter 8, Appendix 1.
17. Cheshire, pp. 187-188; Dicey, pp. 293-294; McLeod, pp. 81-83; *see* B.C. Rule 7(2).
18. McLeod, p. 83; Cheshire, p. 188.
19. As to which, *see* B.C. Rule 11(4).

In the case of a corporation registered in British Columbia, or of a corporation or partnership carrying on business in British Columbia, there is a real connection. But that connection is more properly described as residence. In the case of a partnership, the residence of one of the partners in British Columbia might be considered an appropriate connection even if the partnership does not carry on business in British Columbia.

The rules of jurisdiction now applicable in the United Kingdom in cases related to the European Economic Community, having abandoned presence as a ground of jurisdiction are framed, as to corporations and partnerships, in terms of residence (though the word actually used is "domicile"). The concept of residence as a basis of jurisdiction is discussed in Chapter IV.

Proposed Principle

1. The court should not have jurisdiction over a person, whether natural or artificial, by reason solely of the fact that

(a) the person;

(b) an officer or agent of an artificial person; or

(c) a member of a partnership

has been served within the province.

CHAPTER IV RELATIONSHIP BETWEEN JURISDICTION AND DOMICILE OR RESIDENCE

At common law neither domicile nor residence of the defendant was a sufficient ground for establishing jurisdiction in an action *in personam*.[1] Nor was the domicile or residence of the plaintiff relevant.

Under the extended jurisdiction of the Rules, the court has jurisdiction over persons domiciled or ordinarily resident in the territory.

British Columbia Rule 13(1)(d) permits service out of the jurisdiction where "relief is sought against a person domiciled or ordinarily resident in British Columbia."[2] In Ontario the rule extends to persons "ordinarily resident" in the territory but not to persons "domiciled" in the territory.[3] In England the rule extends to persons "domiciled" within the territory but domicile, in effect, is defined as meaning residence.[4]

The court also has extended jurisdiction under the Rules in respect of the administration of an estate or construction of a will where the deceased person was domiciled in the territory.

British Columbia Rule 13(1)(e) permits service out of the jurisdiction whenever "the proceeding is for the administration of the personal estate of a deceased person who, at the time of his death, was domiciled in British Columbia."[5] British Columbia Rule 13(1)(c) provides for service out of the jurisdiction whenever "it is sought to construe a will affecting personal property if the testator was at the time of his death domiciled in British Columbia."[6]

In Ontario, jurisdiction is given over the administration of an estate and the interpretation of a will of a person resident

---

1. Cheshire, p. 193.
2. The same rule is in effect in: Alberta, Rule 30(c); Manitoba, Rule 28(d); New Brunswick, Rule 19.01(p); Newfoundland, Rule 6.07(1)(c); Saskatchewan, Rule 31(1)(c); and in most States of Australia, and in New Zealand, *see* Nygh, p. 37. The same rule applies in Quebec, *see* Johnson, p. 1023.
3. Rule 17.02(p).
4. Order 11, Rules 1(1)(a) and 1(4).
5. The same rule is in effect in: Alberta, Rule 30(d); Manitoba, Rule 28(e); Newfoundland, Rule 6.07 (1)(d); Saskatchewan, Rule 31(1)(d); England, Order 11, Rule 1(1)(k); and in most States of Australia, and in New Zealand, *see* Nygh, p. 41.
6. The same rule is in effect in: Manitoba, Rule 28(c).

in Ontario at the time of death[7], and the same provision is made in New Brunswick.[8]

The use of domicile as the determinative feature vesting jurisdiction in relation to the personal estate of a deceased person is in keeping with the maxim *mobilia sequuntur personam*. As to real property the general principle is that administration should be sought in the territory where the land is situated.[9]

The selection of the place of domicile of the defendant as a governing factor in exercising jurisdiction is consistent with civil law principles of jurisdiction.[10] Upon joining the European Economic Community the United Kingdom, in relation to the other territories of the Common Market, accepted domicile as being the governing factor in asserting jurisdiction. It is mandatory under the conventions that the courts of the United Kingdom decline jurisdiction where the defendant is not domiciled in the territory, unless the case falls within a specific exception. However, domicile in civil law and under the Conventions is much closer to habitual residence than is the concept in English law.[11]

In the United Kingdom "domicile" is now determined in accordance with the provisions of sections 41 to 46 of the *Civil Jurisdiction and Judgments Act, 1982*, which in essence provides that a person is domiciled in the United Kingdom if

(a) he is a resident in the United Kingdom; and

(b) the nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom.

Commentary

The forum of a defendant's domicile will often be the proper forum to hear an action *in personam*. Since most people reside where they are domiciled, and have their assets there, the courts of their domicile have a *prima facie* interest in tak-

---

7. Rule 17.02(b) and (c).
8. Rule 19.01 (b) and (c).
9. McLeod, p. 93; B.C. Rule 13(1)(b); New Brunswick, Rule 19.01(a); Saskatchewan, Rule 31(1)(b) (as to all property).
10. *Essays on Civil Procedure*, pp. 913-916.
11. Cheshire, p. 157; Hartley, p. 23.

ing jurisdiction over domiciled defendants and the best opportunity of enforcing judgments against them.

However domicile is not always easy of definition or ascertainment.

The problem of selecting domicile as an appropriate factor in asserting jurisdiction arises from the fact that a person may have a domicile in a place where he is not resident. His domicile may be a domicile of origin, a domicile of choice, a domicile of dependence, or a domicile by reverter, and thus his connection with the forum may be tenuous or even nonexistent.

The difficulties of ascertaining domicile, which depends so much upon intention, are notorious.[12] Domicile is a legal concept whereas residence is a question of fact.

The advantages of choosing domicile as the determining factor is that a person must always have one domicile and that there must consequently be one territory in which he can be sued. On the other hand, a person need not always have an ordinary residence at all times.

Notwithstanding this, Ontario and New Brunswick have substituted "ordinary residence" as being the only test, presumably on the basis that the connection between the forum and the person is a real one and easier to determine and that the forum of his residence is a more convenient place for the defendant to be sued.[13]

Because the domicile of a person does not necessarily establish any connection with the territory whereas residence does, it is suggested that the principle be adopted that jurisdiction be granted over persons resident, or who died resident, in British Columbia and that the test of domicile be eliminated.

As to the residence of artificial persons, at common law a corporation doing business in a territory could be served because it was "present" in the territory. If in fact business were being done in the territory through an agent at a fixed place of business for a definite period of time, service could be made on the agent or, under the rules, on a director or officer of the cor-

12. Cheshire, pp. 141-179.
13. *Essays on Civil Procedure*, pp. 941-943.

poration. It was only if no such agent, director, or officer was in the territory that the question arose whether the corporation was domiciled or resident so as to permit service out of the territory. It would, it is suggested, be more helpful to set out in the rules when a corporation may be considered resident in British Columbia so that recourse need not be had to a notional "presence."

The definition of domicile of a corporation set out in section 42(4) of the *Civil Jurisdiction and Judgments Act, 1982*, would seem to be an appropriate one. It is paraphrased as follows:

> A corporation or association has its domicile in the United Kingdom if and only if:
>
> (a) it has its registered office or some other official address in the United Kingdom; or
>
> (b) its central management and control is exercised in the United Kingdom, or
>
> (c) it has a place of business in the United Kingdom.

"Official address" is defined.

As to partnerships, the British Columbia Rule 7(2) permits service upon a partner in the territory, or at the partnership place of business.

As to unincorporated associations, the British Columbia Rule 11(2)(c) provides that service may be made on an officer in the territory.

Assuming that the partner or the officer were themselves ordinarily resident in British Columbia, the Rules can be perceived as identifying the place of residence of the partnership or association.

Proposed Principle

2. (1) The court should have jurisdiction where, at the time of commencement of the proceeding, the defendant is ordinarily resident in the province.

(2) A natural person is ordinarily resident in the province, if the nature and circumstances of his residence indicate that he has a substantial connection with British Columbia.

(3) A corporation is ordinarily resident in the province, if

(a) the corporation was formed under the laws of the province;

(b) the corporation has a registered office or some other official address in the province;

(c) the corporation has a place of business in the province; or

(d) the central management and control of the corporation is exercised in the province.

(4) "Official address" means an address which the corporation is required by law to register or maintain for the purposes of receiving notices or other communications.

(5) A partnership is ordinarily resident in the province, if

(a) one of the partners is ordinarily resident in the province; or

(b) the partnership has a place of business in the province.

(6) An unincorporated association is ordinarily resident in the province if

(a) an officer of the association is ordinarily resident in the province; or

(b) the association has a location in the province for the purpose of conducting its activities.

At common law, jurisdiction was given over a corporation "carrying on business" in the territory, but no jurisdiction was given over a natural person "carrying on business."[1]

However, the common law rules as to jurisdiction over a corporation doing business in the territory are largely obsolete, being almost entirely superseded by the Rules of Court and statutes relating to service upon a corporation.[2]

As a general rule, the Rules of Court in the common law Commonwealth have not extended jurisdiction over persons doing business in the territory, unless the cause of action arose out of such business. Exceptionally, the Rules of Court in Saskatchewan,[3] in New Brunswick,[4] and in Ontario[5] do permit service *ex juris* upon a person carrying on business in the territory.

In New Brunswick[6] and in Ontario[7] it is provided that in cases where service *ex juris* is allowed upon a person doing business in the territory service can be made by leaving the writ with anyone who carries on business within the territory for such person.

In British Columbia, Rule 11(4) provides for service on an agent, where a contract has been entered into within the province by or through an agent residing or carrying on business within the province. In Alberta[8] service on an agent carrying on business in the territory may be made if the cause of action arose in respect of that business.[9]

Commentary

Is it a sufficient connection with the territory, that a defendant is carrying on business there, though not resident there? If so, does the fact that the proceeding does not arise

1. Cheshire, p. 188; Dicey, pp. 295-296; McLeod, pp. 83-84.
2. Cheshire, p. 188; Dicey, pp. 295-296.
3. Rule 31(1)(c).
4. Rule 19.01(p).
5. Rule 17.02(p).
6. Rule 18.02(1)(e).
7. Rule 16.02(1)(e).
8. Rule 20.
9. *See also* Manitoba, Rule 27(1), Newfoundland, Rule 6.04(1); Nova Scotia, Rule 10.04(1), Prince Edward Island, Rule 10.04(1).

out of any business done in the territory alter the perception that there is such a connection?

The fact that the Rules of Court of various provinces differ so widely in their adoption of "doing business" as an appropriate connection, suggests that the question is a troublesome one.

Probably not many individuals carry on business in a territory in which they do not reside, and probably many companies do.

In the case of a non-resident corporation doing business in British Columbia, it is obliged to register itself and provide an address for service. The problem is confined therefore to non-resident individuals doing business and to non-resident corporations which do business in defiance of their obligation to register.

If, as is suggested in the previous chapter, "residence" of an artificial person were defined to include the keeping of a place of business in British Columbia, the problem would be further confined to non-resident defendants who do business only occasionally or through an agent. The question then becomes just what kind of business activity and how much activity in the territory will establish a sufficient connection? This has proved to be a difficult question to answer in the United States.[10]

The Canada-United Kingdom Convention[11] provides in respect of the enforcement of judgments by registration that the original court shall be regarded as having jurisdiction if the judgment debtor, being a body corporate, had its principal place of business in the territory of origin, or (whether a body corporate or not) had an office or place of business in the territory of origin and the proceedings were in respect of a transaction effected through or at that office or place.[12]

It is suggested that the fact that a non-resident defendant does business within the territory but does not maintain

---

10. Casad, ss. 2.02[3][c] and [d] and 3.02[23][b]; *Essays on Civil Procedure*, pp. 921-923, 930-933, 936-937. *See, e.g., World-Wide Volkswagen Corp.* v. *Woodson*, (1980) 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (U.S.S.C.) for an illustration of the difficulties U.S. courts have encountered determining whether the defendant's business activities within the territory of the forum warrant the forum taking jurisdiction over the defendant.
11. Schedule 4 to the *Court Order Enforcement Act*.
12. Articles V(1)(d) and (e).

a place of business in the territory is not a sufficient connection unless the cause of action arose out of the doing of such business. The Alberta rule comes closest to this concept. The British Columbia rule, confining itself to contract, is too limited. In the field of product liability, actions in tort may well arise out of the doing of business in the territory. (See Chapter XV)

It is suggested that a person who keeps a place of business in the territory, whether a corporation or not, has a connection with the territory analogous to residence therein, and that jurisdiction should be exercised whether or not the cause of action is related to the doing of business.

Proposed Principle

3. The court should have jurisdiction over a person

(a) who has a place of business in the province, whether or not the cause of action is in respect of that business; and

(b) who, although he has no place of business in the province, carries on business in the province, and the cause of action is in respect of that business.

Despite the fundamental principle of English law that jurisdiction is founded upon service on the defendant in the territory, it has long been recognized that an absent defendant may confer jurisdiction on the court by submitting to it.[1] A foreign defendant can submit to the jurisdiction in one of three ways:

(1) By entry of an unconditional appearance, or, in territories where the appearance has been abolished, by filing an unconditional defence, or by contesting the merits, or by seeking interlocutory relief consistent only with an intention to contest the merits.[2]

(2) By commencing a proceeding in the forum in which case there is a submission in respect to any claim over, however framed.

(3) By agreement, express or implied, to submit to the jurisdiction which agreement may be made before or after litigation was commenced.

A. Contesting the Merits

By entering a conditional appearance or by applying as a first step to set aside service or to decline jurisdiction, the defendant can take a limited part in the proceeding without entering upon a contest of the merits.[3] There may be cases, however, where the defendant takes a part in the proceeding which goes beyond contesting jurisdiction but not as far as engaging upon a contest on the merits. He may, for example, wish to set aside a default judgment or an *ex parte* order, especially a *Mareva* injunction, while maintaining his right to contest the jurisdiction. Whether he may do so without being held to have submitted is not clear, and it is probably a question of

1. Cheshire, pp. 191-193: McLeod, pp. 107-109; Nygh, pp. 26-27; Gibb, Chapter XV; Read, pp. 160-186; Graupner; Robertson.
2. Conditional appearances have been abolished in British Columbia but a defendant may challenge the jurisdiction by notice of motion without entering appearance or after entering appearance (Rules 14(5) and (6)).
3. Cheshire, p. 192; Dicey, p. 300; McLeod, p. 109; Read, pp. 161-171; Collins, pp. 673-681.

intention in each case.[4] The question asked is whether he seeks relief which is only consistent with an intention to contest the merits.

If a defendant enters an appearance, contests jurisdiction and fails, he may be held to have submitted to the court's jurisdiction even though he takes no further part in the proceeding.[5] If he appeals the decision refusing to set aside service of a writ or refusing to decline jurisdiction, it may be that he does not submit to the court's jurisdiction.[6]

British Columbia Rule 14(8) expressly provides that an application to set aside service *ex juris* or an application challenging jurisdiction, or an application to decline jurisdiction, does not constitute acceptance of the court's jurisdiction.[7]

A defendant applying to the court to decline jurisdiction, does, in effect, submit to the court's jurisdiction, because his application is premised upon the fact that the court does have jurisdiction but should not exercise it. British Columbia Rule 14(8) seems, therefore, to go too far in providing that a person who makes such an application does not submit to the court's jurisdiction.

B. By Initiating Process as a Plaintiff

In general a person who begins an action as a plaintiff gives the court jurisdiction to entertain a counterclaim against him or a claim by a third party against him in some related matter, but not a claim on an independent ground.[8]

C. By Prior Agreement

A contract to submit to the jurisdiction of the court to which the parties would not otherwise be subject will be recognized and enforced. The contract must either be express or necessarily implied from the facts. Such agreement cannot confer jurisdiction upon a court to entertain proceedings be-

4. Sharpe, p. 48; McLeod, p. 109; Cairns, p. 54; Nygh, p. 27.
5. Sharpe, pp. 49-53; Gibb, pp. 200-203.
6. Nygh, p. 27.
7. *See also* English Order 12, Rule 8(6); Ontario Rule 17.06(4).
8. McLeod, p. 108. A counterclaim against an existing plaintiff need not be connected with the original matter of the plaintiff's action, but a counterclaim against the plaintiff and a new party must be. *See* Fraser, p. 242.

yond its internal competence (*e.g.*, divorce, nullity or title to foreign land.)[9]

Because it is service that founds jurisdiction, even where the parties have agreed to submit to the court's jurisdiction, it is necessary for the Rules to make provision for service *ex juris* or for substituted service in such cases.[10]

It is arguable that a court does retain a discretion to decline jurisdiction conferred upon it by contract based upon an overriding consideration of *forum non conveniens*.[11]

The court may insist upon retaining jurisdiction, despite an agreement excluding it, upon the principle that the parties cannot oust the proper jurisdiction of the court by private agreement, and that if such agreement is unreasonable it will not be enforced.[12] The courts may also simply regard the agreement as one factor to be taken into account in considering the question of *forum conveniens*.[13]

While agreements to give jurisdiction generally arise in cases sounding in contract, there is nothing in principle to prevent an agreement referring a claim based in tort to a particular court.[14]

Where jurisdiction is conferred on the court by an instrument, such as a trust deed, to which the parties have not agreed, it could be said that a party to the trust impliedly agrees to submit to the jurisdiction by taking benefits or asserting rights under the trust instrument.

Commentary

While the principle that the court gains jurisdiction by submission of the defendant is not consistent with the theory that jurisdiction is based upon power, the exercise of jurisdiction by submission needs little justification. If the plaintiff is content to seek a judgment in the territory and the defendant to defend there, both parties can be presumed to be looking

---

9. Robertson, p. 296; Cowen, p. 456.
10. *See* B.C. Rules 13(8) and (9); the same rule is found in: Alberta, Rule 30(f)(iv); Manitoba, Rule 29; New Brunswick, Rule 19.01(g)(iv); Newfoundland, Rule 6.07(1)(f)(iv); Ontario, Rule 17.02(f)(iii); Saskatchewan, Rule 31(1)(f)(iv); in England, Order 11, Rule 1(1)(d)(iv); and in most States of Australia and in New Zealand, Nygh, p. 37.
11. Robertson, p. 297; Cowen, p. 457; Sharpe, pp. 25-28.
12. Robertson, pp. 304-310; Cowen, pp. 468-485.
13. Robertson, pp. 300-304.
14. Cowen, pp. 455-456.

after their own interests. If a defendant, not otherwise subject to the jurisdiction, has exigible assets there, his interests may lie in ensuring that no default judgment goes against him or, since he may have to fight the plaintiff's claim somewhere, he may consider it as convenient to defend in the plaintiff's territory as in his own territory.

Unless there is some sound reason for declining to enforce an agreement conferring jurisdiction on the court, or declining to enforce an agreement conferring jurisdiction on a foreign court, it seems that the agreement or submission is an appropriate connection to found jurisdiction.

The fact that the local court is, or is not, the *forum conveniens*, is clearly one element to be considered.

Where a defendant has contested the jurisdiction of the court and has failed, but has not contested the merits, it seems wrong in principle that another court, asked to enforce the default judgment, should regard the defendant as having submitted to the jurisdiction, and as being debarred from contesting the judgment in the enforcing court on the grounds that the court which granted it had no jurisdiction. This rule puts the foreign defendant in an impossible position. If he has no assets in the forum territory he can of course ignore the writ and let the judgment go. He is then safe from having it enforced in his own territory. But if he has assets in the forum territory as well as assets in his own territory, he is forced to enter an appearance to object to the jurisdiction in order to preserve his assets in the forum territory. If he does so, and fails, he exposes his assets to execution, not only in the forum territory but everywhere else in the world.

A provision such as British Columbia Rule 14(8) will not help him in such a situation. It merely provides that a defendant does not submit by objecting. It does not provide that a defendant does not submit if he objects and fails in his objection. If he fails, it is presumably because the court has found that it does have jurisdiction over him on some appropriate ground. But since the decision of a domestic court on its own jurisdiction is not conclusive in a foreign court asked to enforce the judgment, it seems an odd result that a judgment not otherwise recognized in a foreign court will be enforced if the de-

fendant appeared to object to the jurisdiction of the original court.

In such case, the reasoning of Lord Denning in *In re Dulles Settlement (2)*[15] seems persuasive. He said:

> I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all.

Unfortunately, this common sense approach did not appeal to the Court of Appeal in *Henry v. Geoprosco International Limited*.[16] The court held that

(a) if a defendant voluntarily appears before the foreign court, which has jurisdiction by its own local law, to invite that court in its discretion not to exercise the jurisdiction, the defendant will be considered to have submitted to the jurisdiction and

(b) if a defendant enters a conditional appearance to contest the jurisdiction of the foreign court and fails in that contest, he will be held to have voluntarily submitted to the jurisdiction of the foreign court.

This decision has attracted much criticism.[17] In England the distinctions drawn in this and other cases have been abolished by statute.[18]

Proposed Principle

4. (1) The court should have jurisdiction where

(a) a person has initiated a proceeding in the court, in respect of any claim made against that person in the same proceeding by any other party to the proceeding;

(b) a defendant has voluntarily entered appearance or taken part in the proceeding;

---

15. [1951] Ch. 842 (C.A.) at 850.
16. [1976] Q.B. 726.
17. Sharpe, pp. 49-53; Cheshire, p. 345.
18. Section 33 of the *Civil Jurisdiction and Judgments Act, 1982*. But the statute is not free from ambiguity, *see* Cheshire, pp. 346-351.

(c) the defendant has expressly or impliedly agreed to submit to the jurisdiction of the court;

(d) a written instrument has conferred jurisdiction on the court and the proceeding is brought in respect of the relations between or rights or obligations of that person and any other person under the written instrument; or

(e) the proceeding is brought to enforce a judgment against a judgment debtor who has voluntarily entered appearance or taken part in the original proceeding.

(2) A person who has entered appearance or taken part in a proceeding for the sole purpose of

(a) contesting the jurisdiction of the court over him;

(b) requesting the court to stay or dismiss the proceeding on the grounds of forum non conveniens, *or of an agreement to give jurisdiction to another court or tribunal;*

(c) protecting property seized or threatened with seizure as an interlocutory step in the proceeding, on the grounds that the court has no jurisdiction over him;

(d) applying to set aside a default judgment or an ex parte *order, on the grounds that the court has no jurisdiction over him; or*

(e) appealing against a decision made in respect of the above matters

should not be held to have done so voluntarily.

The Rules of Court provide that jurisdiction may be assumed over any person out of the territory who is a necessary or proper party to a proceeding properly brought against some other person duly served within the territory.[1] In England and in New Brunswick the same rule applies but is extended to persons served both within and without the territory.[2]

Whether a person is a necessary or proper party is determined by the Rules of Court relating to joinder and addition of parties, counterclaims against a new party and joinder of third parties.[3]

Three conditions must be fulfilled:

(1) There must be a proceeding properly brought in the sense that the action must not be brought against a defendant in the territory simply to establish jurisdiction over an absent defendant;

(2) A defendant must have been served within the territory before any attempted service is made on the defendant out of the territory. Submission by one foreign defendant will not found jurisdiction against another foreign defendant;

(3) The person joined must be a person who would be properly joined if all the parties had been in the territory.[4]

Commentary

It is easy to see that where, according to the law of the forum, it would be proper to have two or more persons as defendants in an action, or to have a third party joined in the action, a person out of the territory will have such a connection with the territory as to justify assumption of jurisdiction over

1. B.C. Rule 13(1)(j). The same rule is in effect in: Alberta, Rule 30(j); Manitoba, Rule 28(j); Newfoundland, Rule 6.07(1)(j); Ontario, Rule 17.02(o); Saskatchewan, Rule 31(1)(p); and in most of the States of Australia and in New Zealand, Nygh, p. 37-38.
2. England, Order 11, Rule 1(1)(c); New Brunswick, Rule 19.01(o). The rule in New South Wales is to the same effect, *see* Nygh, p. 38. For the rule under the *Civil Jurisdiction and Judgments Act, 1982*, *see* Hartley, p. 57.
3. *See* Fraser, ss. 5.2, 5.3, 5.5, 9.10, 34.2.
4. McLeod, pp. 102-104; Dicey, pp. 312-315; Gibb, pp. 23-27.

him. Such a course will normally be best calculated to dispose of the matter most conveniently for all concerned.

If this is so, why is it a requirement that at least one defendant must have been served within the territory? If jurisdiction has been assumed over an absent defendant under the Rules relating to service *ex juris*, why should the plaintiff or that defendant be prohibited from joining another defendant, or a third party, who is out of the territory?

The English Rule[5] was amended in 1983 to permit service on a necessary or proper party, whether or not the original defendant was served in the territory. At the same time the requirement that the proceeding be "properly brought" against the original defendant was removed from Order 11, Rule 1, and it was provided in Order 11, Rule 4(1)(d) that before leave is granted, the applicant must depose on affidavit that there is a real issue which the plaintiff may reasonably ask the court to try. This was to safeguard against specious claims being brought against a domestic defendant for the purpose of gaining jurisdiction over a foreign defendant or third party.[6]

Since leave to serve is no longer required in British Columbia this screening process is not available. A foreign defendant can, however, raise the question whether the claim against his co-defendant is spurious by objecting to the court's jurisdiction after service. The court may also decline jurisdiction if there is an arguable claim but the forum is not appropriate.

Proposed Principle

5. Where a court has jurisdiction over a person, the court should have jurisdiction over all other persons who are necessary or proper parties to a proceeding, regardless of whether any of them have been served within the province.

---

5. Order 11, Rule 1(1)(c).
6. *Supreme Court Practice*, s. 11/1/12.

The term "immovable property" is used herein to mean land or an interest in land. Immovable property which is trust property or estate property will be discussed in Chapter XVIII.

At common law the court had jurisdiction in an action affecting land situated in the territory, whether the defendant was served within the territory or not.[1] The judgment *in rem* of a court in relation to land would be recognized and enforced by foreign courts if the land was within the court's territory.[2]

The corollary was that the court had no jurisdiction to adjudicate upon the title to or the right to possession of land situated outside the territory.[3]

In addition, the court had no jurisdiction in an action *in personam* to grant damages for any injury to immovables outside the territory, whether arising from trespass, nuisance, negligence or strict liability.[4]

Under the extended jurisdiction conferred by the Rules of Court, service *ex juris* may be allowed:

(1) where the whole subject of the action is land in the territory (B.C. Rule 13(1)(a));

(2) where the proceeding concerns the construction, effect or enforcement of a contract, will, obligation or liability affecting land in the territory (B.C. Rule 13(1)(b));[5]

(3) where the proceeding is for foreclosure of a mortgage of land in the territory (B.C. Rule 13(1)(k)).[6]

---

1. Gibb, pp. 84-89; McLeod, pp. 633-634. Under the E.E.C. Conventions, exclusive jurisdiction is conferred upon a court in "proceedings which have as their object rights *in rem*, or tenancies of, immovable property" in the territory where the property is situated. *See* Hartley, pp. 64-66.
2. McLeod, pp. 633-634; Dicey, pp. 455-458.
3. Cheshire, pp. 255-265; McLeod, pp. 634-636; Dicey, pp. 455-459. Even an agreement to confer jurisdiction may not be sufficient. *See* Robertson, p. 297.
4. Fairley, pp. 257-264.
5. The same rules are in effect in: Alberta, Rule 30(a) and (b); Manitoba, Rule 28(a) and (b); New Brunswick, Rule 19.01(a) and (c); Newfoundland, Rule 6.07(1)(a) and (b); Saskatchewan, Rule 31(1)(a), (b) and (o); and in England (Order 11, Rule 1(1)(g) and (h)); and in most States of Australia, and in New Zealand. *See* Nygh, p. 39. In Ontario, Rule 17.02(a) and (c) gives jurisdiction simply "in respect of real...property in Ontario."
6. The same rule is in effect in: Newfoundland, Rule 6.07(k); Ontario, Rule 17.02(e); in New Brunswick, Rule 19.01(f). In England, under Order 11, Rule 1(1)(i) jurisdiction is given where the claim is made "for a debt secured on immovable property." *(cont....)*

The ownership of immovable property in the territory does not, in English law, give general jurisdiction over the owner.[7]

Commentary

There is an obvious connection between a dispute over land situated in the territory and the courts of the territory, where the proceeding is a claim for title or an interest in the land, possession of the land, or enforcement of security given over the land. A judgment in such case is a judgment *in rem*, and only the courts of the territory have power to enforce the judgment. To assume jurisdiction on the one hand, and, on the other hand to deny jurisdiction to any other court is accordingly logical.

But where no claim is asserted as to title or possession, the connection is not so obvious. An action in contract may affect title (such as an action for specific performance) or it may not (such as an action for damages for breach of contract to sell land). An action in tort may affect title (such as a fraudulent conveyance action) or it may not (such as an action for damages for trespass).

The rule stated in the *Mocambique* case,[8] that a court has no jurisdiction in an action for trespass to foreign lands, has attracted persistent criticism.[9] The Nova Scotia Commissioners Report to the Uniform Law Conference of Canada[10] described the rule as "an indefensible rule that was created by the House of Lords out of an obsolete distinction in England between local and transitory actions that arose out of the need to have questions of title to land decided by jurors who resided in the county where the land was situated." The United Kingdom has now legislated to provide that courts in England

---

6. *(...cont.)* Other territories do not have this rule because a proceeding for foreclosure of immovable property is, presumably, considered to be covered by the equivalent of B.C. Rules 13(1)(a) or (b). *See* Nygh, p. 39. Consequently, the equivalent rule in these territories covers foreclosure of a mortgage on personal property only.
7. It does give jurisdiction in Scotland; *see* Gibb, pp. 49-54; Anton, pp. 102-105; Black, pp. 37-38; and in the U.S.A., *see* Casad, s 1.0.[3]; and in Quebec, *see* Johnson, pp.1032-1034.
8. *British South Africa Co.* v. *Companhia de Mocambique*, [1893] A.C. 602 (H.L.) applied in British Columbia in *Boslund* v. *Abbotsford Lumber, Mining and Development Co.*, [1925] 1 W.W.R. 475 (S.C.). The rule has been recently confirmed, though criticized, in *Hesperides Hotels* v. *Muftizade*, [1979] A.C. 508 (H.L.).
9. Fairley; Read, pp. 186-198; Hartley, p. 65; *Essays on Civil Procedure*, pp. 980-983.
10. 1963 (Appendix J).

and Northern Ireland may hear proceedings for damages for trespass to, and other torts in respect of foreign land.[11]

Given the increase in litigation across provincial boundaries (and state boundaries), which arise out of damage to real property from pollution of air and water, it seems time to provide that a plaintiff may sue a defendant in a territory where the harm originated (and where the defendant normally would have his assets) as an alternative to suing in the territory where the land is situated. It may be, of course, that the courts of the territory where the land is situated will be the *forum conveniens* and that jurisdiction may be declined in favour of such courts where an action is inappropriately brought in another forum, but that does not affect the principle that a court should take jurisdiction in cases not involving title to immovable property, where there is some real connection between the defendant and the territory, or the cause of action and the territory.

Proposed Principle

6. (1) The court should have jurisdiction where the proceeding is brought to enforce, assert, declare or determine proprietary or possessory rights or security in or over land situated in the province.

(2) The court should not have jurisdiction where the proceeding is brought to enforce, assert, declare or determine proprietary or possessory rights or security in or over land not situated in the province.

(3) The court should have jurisdiction where the proceeding is for trespass to, or any other tort affecting, land situated out of the province in cases where the court would otherwise have jurisdiction over the defendant.

---

11. *Civil Jurisdiction and Judgments Act, 1982*, s. 30; Hartley, p. 65; Cheshire, pp. 265-266.

The term "movable property" is used in this Study Paper to mean all property other than real property. Movable property which is trust property or estate property will be dealt with in Chapter XVIII.

At common law, there was no jurisdiction by reason of the presence of movable property in the territory.

Under the extended jurisdiction granted by the Rules of Court, the presence of movable property in the territory is a ground of jurisdiction in some cases where it is the subject matter of a proceeding.

British Columbia Rule 13(1)(k) extends jurisdiction where the proceeding is by a mortgagor or mortgagee in relation to a mortgage of movable property in the territory, and where the proceeding seeks relief in the nature of sale or foreclosure, whether or not personal judgment is also sought.[1]

British Columbia has no general rule conferring jurisdiction over a defendant where the subject matter of the proceeding is movable property in the territory. In Ontario[2] and in New Brunswick[3] the Court has jurisdiction where the proceeding consists of a claim "in respect of personal property" in the territory, and a similar rule is found in some Australian States.[4]

Commentary

There does not seem to be any reason in principle why the presence of movable property in the territory should not found jurisdiction where the cause of action relates to the right to ownership or possession of the property or to enforcement of security over the property. Indeed, the territory where the property is to be found would seem to have the best claim to jurisdiction in respect of it. It is true, as is pointed out by Foote[5]

1. The same rule is in effect in: Alberta, Rule 30(k); Manitoba, Rule 28(k); Newfoundland, Rule 6.07(1)(k); and in some States of Australia and in New Zealand, *see* Nygh, p. 39; but it is provided that no claim for personal judgment may be made. In Ontario (Rule 17.02(e)) and in England (Order 11, Rule 1(1)(i)) there is no prohibition against claiming personal judgment. The reason for the rule is given by McLeod, p. 95.
2. Rule 17.02(a).
3. Rule 19.01(b).
4. *See* Nygh, p. 39.

that movable property will always be in the possession of some person in the territory and that "there will seldom be any difficulty as to finding a suitable defendant at home, without seeking one abroad." But this involves suing a person not interested in the action and forcing him to interplead against a foreign defendant. It would be more appropriate to allow the foreign defendant to be directly impleaded, as is now allowed in Ontario.

Problems may, of course, arise in determining the *situs* of intangible property. One theory applied in some states of the United States is that the location of the document evidencing ownership of intangible property is the location of the property.[6] Whatever difficulties may arise in this area, can, it is suggested, be dealt with by application of the doctrine of *forum conveniens*. The court with the ability to enforce any order as to the disposition of intangible property would normally be the appropriate forum.

Movable property is, by definition, movable, and the objection may be made that the court's connection with the property may be tenuous since the defendant can remove it. However, a court is quite capable by interlocutory order made under a rule such as British Columbia Rule 46, of freezing the location of movable property pending the outcome of the proceeding.

Proposed Principle

7. The court should have jurisdiction where the proceeding is brought to enforce, assert, declare or determine proprietary or possessory rights or security in or over property, other than land, situated in the province.

---

5. Quoted in Cheshire, p. 214.
6. *Essays on Civil Procedure*, pp. 950-952; *see* Nygh, p. 40 for the position in New Zealand.

CHAPTER X RELATIONSHIP BETWEEN JURISDICTION AND EXIGIBLE ASSETS WITHIN THE TERRITORY

At common law, the fact that the defendant had assets in the territory against which execution might be levied did not give the court jurisdiction. The Scottish practice (and the practice of some other civil law countries) of attaching assets to found jurisdiction was not known to English law. Nor does English law recognize the *quasi in rem* jurisdiction found in the United States, which enables a personal action to be brought against an absent defendant if he has chattels in the territory. Attachment of the chattels founds jurisdiction but the judgment is limited to the value of the chattels.[1]

Under the extended jurisdiction conferred by the Rules of Court, attachment of assets to found jurisdiction is still unknown. However, the existence of exigible assets in the territory is the foundation, without attachment, of jurisdiction in several cases. Under British Columbia Rule 13(1)(m) the court has jurisdiction if the "proceeding is founded upon a contract, or is in respect of a claim for alimony, and the defendant has assets in British Columbia." Under British Columbia Rule 13(1)(p), the court has jurisdiction if the "proceeding is brought upon a foreign judgment and the defendant or respondent has assets in British Columbia."[2]

In neither case is the judgment limited to the value of the asset. The asset may have a negligible value, but the judgment will go for the full amount of the claim.

Commentary

This jurisdiction has been described as "extraordinary, in that no connection between the defendant and the jurisdiction or the cause of action and the jurisdiction is required. The pro-

---

1. *See* Cheshire, pp. 213-214; Gibb, pp. 61-78; Casad, s. 1.01[3]; *Essays on Civil Procedure*, p. 914. Quebec exercises the same jurisdiction, but not confined to the value of the property, *see* Johnson, pp. 1032-1034.

2. The same rule is found in: Alberta (Rule 30(p)) but only in respect of a cause of action "upon a judgment or for alimony or maintenance;" in Manitoba (Rule 30); in Newfoundland (Rule 6.07(r)) but only in respect of an order for alimony or maintenance; and in Saskatchewan (Rule 31(1)(j)) but only upon a foreign judgment. Ontario used to have the same rule (Rule 25(1)(k)), but abandoned it in 1975. No such rule is found in England, or in any of the Australian States or New Zealand.

vision has the potential of causing widespread unfairness to defendants."[3]

In the United States, where the attachment or garnishment of assets within a territory is recognized as conferring jurisdiction, the Supreme Court has recently said:[4]

> The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state court jurisdiction that is fundamentally unfair to the defendant.

The connection between the defendant and the forum created by his having personal property within the territory seems too tenuous to be a proper basis for asserting jurisdiction in a proceeding having no relation to that property.

As to "contract claims," if the relationship is seen as being that the existence of assets gives the court power to enforce a judgment for a contractual claim, then the elaborate rules which apply when jurisdiction is asserted in contractual claims seem largely unnecessary. If the defendant has assets in the territory, the plaintiff ought not to be able to avoid the restrictions inherent in rules such as B.C. Rules 13(1)(g) by relying solely upon a rule such as B.C. Rule 13(1)(m). If the defendant does not have assets in the territory, then the plaintiff should either sue where the defendant resides, thus securing for himself an internationally recognized judgment, or sue under the provisions of Rule 13(1)(g) and take the chance that the defendant will submit to the jurisdiction, thus giving him an internationally recognized judgment.

As to "alimony claims," if the plaintiff is resident in British Columbia and the defendant is not, the court will in most cases have jurisdiction under the *Family Relations Act* to make a provisional order or under the *Divorce Act* to make a final order of maintenance. If the defendant is resident in British Columbia and the plaintiff is not, the court will have jurisdiction under Rule 13(1)(d). So the rule is only applicable if neither the plaintiff nor the defendant is resident in British Columbia. In such case, the fact that the defendant has assets in British Columbia is clearly an inappropriate ground on

---

3. McLeod, pp. 104-105; *see also Essays on Civil Procedure*, pp. 955-956.
4. *Shaffer* v. *Heitner*, (1977) 433 U.S. 186, 212; *see* Casad, s. 2.04[2].

which to found jurisdiction. The proper forum for the action is that of the plaintiff's residence or the defendant's residence where the question of how much alimony or maintenance should be awarded can be properly determined. If it is desired to enforce such an order against a defendant who has assets in British Columbia, then generally such a judgment would be enforceable under Reciprocal Enforcement of Maintenance Orders legislation or under the *Divorce Act*.[5]

As for "judgments," it seems an unnecessary restriction to stipulate that before a judgment creditor can sue an absent defendant in British Columbia on a foreign judgment, the defendant must have assets in British Columbia.

Lack of assets may be a reason for declining jurisdiction, but the presence of assets should not be a prerequisite to vesting jurisdiction in an action upon a foreign judgment.

The principles upon which jurisdiction should be exercised in an action upon a judgment are more fully considered in Chapter XIX.

Proposed Principle

8. The court should not have jurisdiction by reason solely of the fact that assets of the defendant are situated in the province.

---

5. In this connection *see* Mendes da Costa, vol. 2, c. 15.

CHAPTER XI RELATIONSHIP BETWEEN JURISDICTION AND CAUSE OF ACTION - GENERAL

Under the *Common Law Procedure Act, 1852*,[1] in which provision for assumed jurisdiction was first made in England, service was permitted where there was "a cause of action which arose in the jurisdiction" or "in respect of a breach of contract made within the jurisdiction." Order 11 of the Rules of 1873 and 1883 abandoned this broad head in favour of specific provisions in the area of contract and tort. Further specific heads were subsequently added.

Many of the heads of assumed jurisdiction are now concerned not with the connection of a defendant to the forum, but are concerned with isolated acts which create a connection between the cause of action and the forum. Thus, actions arising out of a contract to be performed in the territory, or a tort committed in the territory, or the threat of a harmful act in the territory, are considered a sufficient basis for asserting jurisdiction over an absent defendant.

The Rules, however, do not assert any general principle that a cause of action arising in the territory is a sufficient ground for asserting jurisdiction.[2]

Commentary

This "pigeon-hole" approach adopted by the Rules has the advantage of enabling litigants to determine, with more or less precision, when a court will take jurisdiction over an absent defendant. It has the disadvantage of not addressing the real issue which is whether there is a sufficient connection between the cause of action and the territory.

This broad concept is well known in the area of venue. When it comes to allocating judicial business between the courts of British Columbia, the test, whether the cause of action arose in the court's territory, is employed in the *County Court Act* and in the *Small Claims Act*.[3] Since provision exists for transfer rather than dismissal where the wrong venue is selected, the consequences of picking the wrong venue are not

1. Section 18.
2. But such a rule is found in New South Wales, *see* Nygh, p. 35, and in Quebec, *see* Johnson, pp. 1024-1032, and, formerly, in Scotland, *see* Anton, pp. 117-119.
3. *County Court Act*, s. 49(c); *Small Claims Act*, s. 7(1).

serious.[4] It is not therefore necessary to be more specific in defining where a cause of action may be said to have arisen.

The justification for extending jurisdiction over a defendant where the cause of action arose in the territory may be that the courts of the territory where the cause of action arose will generally be the *forum conveniens*, because the evidence will normally be there, and because the law to be applied to the proceeding will normally be the law of the territory where the cause of action arose. Justification may also be that the defendant, having performed an activity in the territory which gives rise to an obligation, impliedly consents to jurisdiction being exercised over him.[5]

While there is no general rule enabling a court to take jurisdiction over a defendant because the cause of action arose in the territory, the existence of Rules such as British Columbia Rule 13(3) which provides that the court may grant leave to serve an originating process out of British Columbia in cases not otherwise provided for, does enable the court to exercise jurisdiction upon that basis.[6]

It has been said, in relation to a similar broad discretion provided for in the *Federal Court Rules*,[7] that the question of *forum conveniens* is integral to the exercise of that discretion.[8] Clearly the concepts overlap. The fact that the cause of action arose in the territory would be a strong indicator that the courts of the territory were the *forum conveniens*.

However, to adopt a general rule that the court should have jurisdiction where the cause of action arose in the territory might be inadvisable. Firstly, it might result in jurisdictional overreaching if the concept were not clearly defined. Secondly, it might result in uncertainty on the part of practitioners as to whether a writ served, without leave, might not be set aside. Most cases of "cause of action" grounds for the exercise of jurisdiction are already set out in the rules, and if the proposed principle set out in Chapter XX in relation to the general residuary discretion of the court is adopted, the re-

4. *County Court Act*, s. 51(1); *Small Claims Act*, s. 7(3).
5. *Essays on Civil Procedure*, pp. 945-947, 1002-1006.
6. The exercise of a general discretion is also provided for by the Rules in: New Brunswick, Rule 19.02; Nova Scotia, Rule 10.07; Ontario, Rule 17.03; Prince Edward Island, Rule 10.07; Saskatchewan, Rule 31(2).
7. Rule 307.
8. *Per* Laskin J., in *Antares Shipping Corp.* v. *The Ship "Capricorn,"* [1977] 2 S.C.R. 422, 435-437.

maining cases might be more properly dealt with in the exercise of a discretion and after a close examination of the alleged grounds of connection and after weighing them in the balance upon a consideration of *forum conveniens.*

Proposed Principle

9. The court should not have jurisdiction, in cases not specifically provided for, by reason solely of the fact that the cause of action arose in the province.

The Rules of Court extend jurisdiction in numerous cases where the cause of action arises in contract.

A. Contract Made in the Territory

The fact that a contract was made in the territory is not, by itself, a ground for assuming jurisdiction in British Columbia, but it is in England and elsewhere in Canada and the Commonwealth. The English Rule[1] provides that service *ex juris* may be made where "the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which...was made within the jurisdiction." The Ontario Rule[2] provides that service *ex juris* may be made where the proceeding consists of a claim "in respect of a contract where...the contract was made in Ontario."[3]

Commentary

Where a contract is "made" causes some difficulty in application, but in general it can be said that a contract is made where the last act necessary for the formation of the contract has taken place.[4]

The word "contract" has been interpreted to include "quasi-contract" (*e.g.*, a claim for *quantum meruit*, restitution, unjust enrichment and money had and received).[5]

It has been questioned whether the place where a contract is made is an appropriate ground upon which jurisdiction should be assumed, since the rules as to where a contract is concluded were developed by the courts in relation to problems of contractual formation rather than jurisdiction, and when applied with respect to the latter, can be expected to produce

1. Order 11, Rule 1(1)(d)(i).
2. Rule 17.02(f)(i).
3. The same rule is found in: Alberta, Rule 30(f)(i); Manitoba, Rule 28(f)(i); New Brunswick, Rule 19.01(g)(i); Newfoundland, Rule 6.07(1)(f)(i); Saskatchewan, Rule 31(1)(f)(i); and in most Australian States and in New Zealand, Nygh, p. 32; and in Quebec, *see* Johnson, pp. 1034-1042.
4. Cairns, pp. 59-60; Nygh, p. 32; McLeod, pp. 96-97; Dicey, pp. 316-317.
5. Cairns, pp. 58-59; McLeod, p. 97; Cheshire, p. 199.

arbitrary results.[6] In the course of contract negotiations between persons in different territories in which offers and counter offers are made it may be a matter of chance where the "last act" occurs. Nevertheless, in most cases the place where the contract is made is reasonably clear and the court can, by a sensible application of the doctrine of *forum non conveniens*, weed out those cases where the rules as to where a contract is concluded produce a result incompatible with a proper exercise of jurisdiction.

Proposed Principle

10. The court should have jurisdiction where the claim arises in respect of a contract made in the province, and, where the claim arises in respect of a "quasi-contract," where the obligation arose in the province.

B. Contract Made by an Agent Residing Or Carrying on Business in the Territory

The assumed jurisdiction over persons who enter into a contract by or through an agent residing or carrying on business in the territory is dealt with by various states in one of two ways:

(a) In some cases the Rules provide that in contractual claims, service upon an agent in the territory is the equivalent of service upon the principal. In some cases the Rules provide that no leave to serve the agent is required and in some cases leave is required.

British Columbia Rule 11(4) reads as follows:[7]

> Where a contract has been entered into within the Province by or through an agent residing or carrying on business within the Province on behalf of a principal residing out of the Province, by leave of the court given before the determination of the agent's authority or of his business relations with the principal, a writ of summons or other document in a proceeding re-

---

6. Sharpe, pp. 21-22; *see also* Cairns, pp. 59-60; *Essays on Civil Procedure*, pp. 926-928.

7. The same rule is found in: Alberta, Rule 20, "if the cause of action arose in respect of that business"; Newfoundland, Rule 6.04(1); Nova Scotia and Prince Edward Island, Rule 10.04(1), if "the proceeding arose through dealings with or through the agent;" Saskatchewan, Rule 22(2)(g) if the principal "carries on business in Saskatchewan;" and in England, Order 10, Rule (2).

lating to or arising out of the contract may be served on the agent.

(b) In some cases the Rules provide that service *ex juris* on the principal may be served *ex juris* where the principal has entered into a contract made by or through an agent trading or residing in the territory.

British Columbia has no such rule. The English Rule[8] provides that service *ex juris* may be made on the principal in a contractual claim if the contract "was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction."[9]

Commentary

In the first case, where service on an agent in the territory is the foundation of jurisdiction, such exercise can be justified on the basis that a person who carries on business through an agent in the territory can be perceived as being "present" in the territory.[10] This ground for asserting jurisdiction is discussed in Chapter V. British Columbia Rule 11(4) confines the right to serve the process upon an agent of a natural person to a case where "a contract has been entered into within the province by or through an agent," but British Columbia Rule 11(2)(b) extends the right to serve process upon an agent of a corporation to every case, whatever the cause of action, where an agent carries on any of the business of a corporation within the province. It is an anomaly, therefore, that under the Rules jurisdiction over corporations is assumed more readily than jurisdiction over natural persons.

In the second case, where service on the principal *ex juris* is the foundation of jurisdiction, such exercise can be justified on the basis that where the contract was "made" in the territory, the courts of the territory are the natural forum.[11]

If a broad rule were adopted that a claim in respect of a contract made in British Columbia will found jurisdiction, it

---

8. Order 11, Rule 1(1)(d)(ii).
9. The same rule is found in: Alberta, Rule 30(f)(ii); Manitoba, Rule 28(f)(ii); New Brunswick, Rule 19.01(g)(i); Newfoundland, Rule 6.07(1)(f)(ii); Saskatchewan, Rule 31(1)(f)(ii); and in most Australian States and in New Zealand, Nygh, p. 32; and in Quebec, *see* Johnson, pp. 1012, 1041.
10. Sharpe, pp. 34-36; *Essays on Civil Procedure*, pp. 931-932.
11. Sharpe, pp. 22-23.

would be unnecessary, where the contract was made by or through an agent, to enquire whether the agent was carrying on business or residing in the territory.

The present Rule requires leave to serve the agent within British Columbia and requires that the principal out of the territory be served by registered mail as well. Leave will not, presumably, be granted unless British Columbia is *forum conveniens*. Since the same question will arise when the agent is served in the territory as when the principal is served out of the territory, the rule does not give an absolute right to invoke the jurisdiction of the court.[12] The only advantage of this special rule is that service can be effected in a more expeditious and cheaper manner on the agent in the territory than the principal out of the territory and this advantage should, it is suggested, be preserved.

Ontario does not make special provision for contracts made by or through agents. Jurisdiction is assumed either because the contract was "made" in Ontario or because the principal "carries on business" in Ontario and whether he does so either personally or through an agent is not material.

The Rule that a claim in respect of a contract made "through" an agent (in contrast to "by" an agent) in the territory will found jurisdiction, has been interpreted to allow a court to exercise jurisdiction though the agent had no authority to conclude a contract but was merely a "conduit."[13] This seems wrong in principle since in such case there may be little or no connection between the contract and the forum.

It is suggested, therefore, that the principle that service upon an agent in the circumstances set out in Rule 11(4) founds jurisdiction should be abolished. The matter of service upon agents should be dealt with simply as a matter of practice and procedure. This suggestion will be taken up in Chapter XXIII.

C. Contract to be Performed in the Territory

Jurisdiction under the Rules of Court may be assumed when a breach of contract occurs within the territory, even

12. It has been ruled in England that leave will not be granted where there is no difficulty in serving the principal *ex juris*; *see Supreme Court Practice*, (1985) s. 10/2/2.
13. Cheshire, p. 199; Dicey, p. 317; McLeod, p. 96.

though the breach was preceded or accompanied by a breach of contract out of the territory, which rendered impossible the performance of that part of the contract which was to have been performed within the territory.[14] Since, in order for a breach to be committed within the territory some performance must have been required within the territory, this Rule gives jurisdiction, in effect, where the contract was to be performed in the territory.

While in general the Rules do not give jurisdiction because a claim is made in respect of a contract which is to be performed in the territory, jurisdiction is granted under this broad heading in the *Code of Civil Procedure* of New Zealand and in the *Civil Jurisdiction and Judgments Act, 1982*[15] in relation to persons domiciled in a state of the European Economic Community.[16]

Commentary

British Columbia Rule 13(1)(g) is modelled, as are the equivalent Rules in other provinces and Commonwealth countries, on English Order 11, Rule 1(1)(e) which was introduced in 1920 to overcome the decision in *Johnson* v. *Taylor*.[17] Under the Rule as it stood then, jurisdiction was assumed where "the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction..."[18] It was held that where there was a breach of contract abroad to ship goods C.I.F. England, and a breach of contract in England to deliver shipping documents to the buyer, leave could not be granted to serve *ex juris* in respect of the latter breach, because the former breach had removed the whole substratum of the contractual obligation, rendering performance within the court's territorial limits impossible.[19] The question which arises, however, is why was the former Rule confined to an action for breach of contract? If the sufficient connection between the contract and the forum is that

14. B.C. Rule 13(1)(g). The same rule is found in: Alberta, Rule 30(g); Manitoba, Rule 26(g); New Brunswick, Rule 19.01(g)(v); Newfoundland, Rule 6.07(1)(g); Ontario, Rule 17.02(f)(iv); Saskatchewan, Rule 31(f)(v); England, Order 11, Rule 1(1)(e); and in most States of Australia and in New Zealand, *see* Nygh, pp. 33-35.
15. Schedule 1, s. 2(1).
16. Nygh, p. 35; Hartley, pp. 43-48.
17. [1920] A.C. 144 (H.L.).
18. Order 11, Rule 1(e) of the *Rules* of 1883.
19. Sharpe, p. 21; *Supreme Court Practice*, (1985) s. 11/1/18; Cheshire, p. 201.

the contract was to be performed in the territory, then it seems logical that jurisdiction should be assumed in every action in which the claim relates to that contract (*e.g.*, an action for the interpretation of the contract, or for setting it aside, or for an account). Further, if the breach of contract is denied, the court may be faced with a difficulty of investigating the facts on an interlocutory application to set aside service *ex juris*.

The more appropriate Rule seems to be the broad Rule adopted by the *Civil Jurisdiction and Judgments Act, 1982*.

Proposed Principle

11. The court should have jurisdiction where the proceeding is founded upon a contract to be performed, in whole or in part, in the province, except that where the proceeding is founded upon a breach of an obligation under a contract, the court should have jurisdiction only where that obligation was to be performed, in whole or in part, in the province.

D. Contract Governed by the Laws of the Territory

This is not a ground of jurisdiction in British Columbia, but it is in England and in many other provinces and Commonwealth countries. The English Rule[20] provides that service *ex juris* may be made in a contractual claim if the contract "is by its terms, or by implication, governed by English law."[21]

Commentary

Under this rule, the test is simply that of the choice of law rule. But considerations of choice of law and jurisdiction ought to be distinguished and segregated.[22] An assertion of jurisdiction over parties who have not by their contract selected the forum as the appropriate one in which to try the proceeding, ought not to be based solely upon the law to be applied in the resolution of the dispute. It is relevant where the question of *forum conveniens* is being considered. It may be that a court should decline jurisdiction where the law to be applied is

---

20. Order 11, Rule 1(1)(d)(iii).
21. The same rule is found in: Alberta, Rule 30(f)(iii); Manitoba, Rule 28(f)(iii); New Brunswick, Rule 19.01(g)(iii); Newfoundland, Rule 6.07(f)(iii); Ontario, Rule 17.02(f)(ii); Saskatchewan, Rule 31(1)(f)(iii); and in most States of Australia and in New Zealand, *see* Nygh, pp. 32-33.
22. Sharpe, pp. 23, 86.

the law of a foreign state, but it does not follow that, absent any other connection between the transaction and the forum, a court should accept jurisdiction because domestic law is applicable.

In any event, in the absence of a contractual provision, the question of what law applies is not an easy one to answer, depending upon the expectation of the parties and upon degrees of relationship between domestic law and the transaction. It is not a subject suitable to be canvassed in an interlocutory proceeding.

The reason the provision is found in the English rules is that London is a major centre for the resolution of private international disputes. Parties to "international" contracts may provide that English law (or a particular set of English standard insurance or marine clauses) will be the governing law, but may neglect to provide that the English courts will be the forum for the resolution of disputes. It is seen in England as being not only commercially advantageous but entirely proper that, if a dispute is to be resolved by the application of English law, it should be resolved by English courts. However, in exercising this somewhat anomalous jurisdiction, the English courts impose a heavy burden on a plaintiff to justify the English court as the *forum conveniens*.

Ignoring any commercial motives, it would appear to be a sufficient jurisdictional connection that the parties have contractually chosen British Columbia law as the governing law, but have neglected (as frequently happens) to turn their minds to whether British Columbia is the appropriate forum to determine any dispute arising under the contract.

Proposed Principle

12. (1) The court should not have jurisdiction by reason solely of the fact that the claim is in respect of a contract governed by the law of the province.

(2) The court should have jurisdiction where the parties to a contract have by its terms agreed that the law of British Columbia shall govern.

E. Damage Suffered in the Territory by Virtue of a Breach of Contract Committed Elsewhere

This is not a ground of jurisdiction in British Columbia, but it is in Ontario, New Brunswick and Saskatchewan. Ontario Rule 17.02(h) allows service *ex juris* where the claim is in respect of damage sustained in Ontario, arising from a tort or a breach of contract, wherever committed.[23]

Commentary

The rule was introduced in Ontario in 1975 to overcome the restrictive view taken, prior to the *Moran*[24] decision, on the place of commission of a tort. The rule has been criticized as adopting the "last event" theory which was not accepted, in respect of torts, in the *Moran* case.[25] The rule can produce arbitrary results.[26] If the contract was not to be performed in the territory, and there is no other connection with the territory, the rule amounts to an assertion of jurisdiction in a contractual claim by reason only of the plaintiff's residence in the territory, because he suffered damage where he resides. The residence of the plaintiff in the territory is, almost universally, not recognized as being a sufficient foundation for the exercise of jurisdiction, except in relation to "consumer contracts" (a subject discussed in Chapter XIII).

Proposed Principle

13. The court should not have jurisdiction by reason solely of the fact that the plaintiff has suffered damage in the province by reason of a breach of contract committed elsewhere.

F. Sale of Goods

British Columbia Rule 13(1)(o) provides that jurisdiction may be assumed where "the claim arises out of goods or merchandise sold or delivered in British Columbia." This provision is unique to British Columbia. The rule permits service *ex juris* in a claim against a foreign vendor, and in a claim

---

23. For Saskatchewan, *see* Rule 31(1)(f)(vi); for New Brunswick, *see* Rule 19.01(i).
24. *Moran* v. *Pyle National (Canada)*, [1975] 1 S.C.R. 393, [1974] 2 W.W.R. 586 (S.C.C.).
25. Sharpe, pp. 23-25.
26. In *Canadian General Electric Co.* v. *C.M. Windows & Stained Glass*, (1977) 16 O.R. (2d) 188 (S.C.), a Quebec defendant had failed to make payment under a contract under which payment was to be made in Quebec. It was held that the Ontario plaintiff suffered damage in Ontario where its head office was, because the whole company suffered damage by reason of non-payment in Quebec.

against a foreign purchaser, provided the goods were sold or delivered in British Columbia. It applies to "commercial" contracts as well as to "consumer" contracts. It appears to apply to tort claims as well as to contractual claims.

Commentary

In part, the Rule was necessary in British Columbia because of the absence of a general rule giving jurisdiction where a contract was made in British Columbia, or where a contract was to be performed in British Columbia. If such general rules were adopted for all contracts, some of the reason for Rule 13(1)(o) would disappear. If goods are "sold" in British Columbia, presumably the contract of sale will have been made in British Columbia. If goods are "delivered" in British Columbia, presumably the contract of sale will have been "performed" in British Columbia. If there are any cases in which goods might be sold or delivered in British Columbia but the contract was not made or is not to be performed in British Columbia, then the relationship between the activities of the parties and the forum is probably too remote to justify the exercise of jurisdiction.

It is probable, moreover, that the rule was enacted in response to a perceived problem in the field of consumer contracts, rather than in commercial contracts. This is a subject addressed in the next chapter. The rule, because it only relates to actions arising out of the sale of goods, is, it is suggested, too narrow. As a rule which applies to torts, it may be stated too broadly.

It is suggested that the rule ought to be dropped in favour of more general rules relating to all contractual claims and to all tort claims.

G. Interpretation of Contracts and Other Documents

Where a claim is to construe, rectify, set aside or enforce an "act, deed...contract...or liability" affecting land in the territory the Rules of Court extend jurisdiction.[27] In relation

27. British Columbia, Rule 13(1)(b). The same rule is found in: Alberta, Rule 30(b); Manitoba, Rule 28(b); New Brunswick, Rule 19.01(c); Newfoundland, Rule 6.07(1)(b); Saskatchewan, Rule 31(1)(b); Ontario, Rule 17.02(c); and in England, Order 11, Rule 1(1)(h) and in most States of Australia and in New Zealand, *see* Nygh, p. 39.

to movable property, jurisdiction must generally be founded upon some other ground, such as those dealt with earlier in this chapter. In Ontario and New Brunswick, and in some states of Australia and in New Zealand, the provision covers both movable and immovable property.[28]

Commentary

There is obviously some overlap between this provision and a provision such as British Columbia Rule 13(1)(a) in which jurisdiction is given where the whole subject matter of the proceeding is land in British Columbia. There are also some obscurities in the rule. Is the "subject matter" of a proceeding to set aside a contract for the sale of land, the land or the contract? Is an action for breach of contract for the sale of land covered because it "affects" land in the territory? Does the word "enforce" restrict the jurisdiction to a claim for specific performance? In what way can a contract "affect" land if it does not affect the title to or possession of the land?

It seems that the action must directly affect the property itself, not just its value, and that the section does not include a claim, for example, for rent.[29]

Proposed Principle

14. The court should have jurisdiction where the proceeding is brought to interpret, rectify, set aside, or enforce any deed, contract or other instrument affecting any property, real or personal, situated in the province.

---

28. Nygh, p. 39; Ontario, Rule 17.02(cXi); New Brunswick, Rule 19.01(cXi).
29. *See* Nygh, pp. 39-40; Cheshire, p. 203; McLeod, p. 91; Cairns, pp. 56-57.

CHAPTER XIII RELATIONSHIP BETWEEN JURISDICTION AND CAUSE OF ACTION - CONSUMER CONTRACTS

The Rules of Court do not, in allocating jurisdiction, distinguish between a proceeding brought by or against a consumer and a proceeding brought by any other plaintiff, or against any other defendant.

In Saskatchewan, under the *Consumer Products Warranties Act*[1], jurisdiction is extended over foreign manufacturers or retailers who carry on business in Saskatchewan in cases involving consumer products bought or used in Saskatchewan, whether arising in contract or in tort. A foreign defendant may be served if:[2]

(a) he holds title to land in Saskatchewan or any interest in land in Saskatchewan for the purposes of carrying on business in Saskatchewan;

(b) he maintains an office, warehouse or place of business in Saskatchewan;

(c) he is licensed or registered under any statute of Saskatchewan entitling him to do business or to sell securities of his own issue;

(d) his name and telephone number are listed in a current telephone directory and the telephone is located at a place in Saskatchewan for the purposes of carrying on business in Saskatchewan;

(e) an agent, salesman, representative or other person conducts business in Saskatchewan on his behalf;

(f) he directly or indirectly markets consumer products in Saskatchewan; or

(g) he otherwise carries on business in Saskatchewan.

Under the English *Civil Jurisdiction and Judgments Act, 1982*[3] special rules as to jurisdiction apply in the case of consumer contracts. A party to a contract is regarded as a consumer when he concludes a contract for a purpose outside his trade or profession. The special rules were probably intended to apply only where the other party acted in the course of his trade or profession.[4] In general, the consumer may bring a proceeding either in the courts of the state in which the con-

1. R.S.S. 1978, c. C-30, s. 33.
2. *Ibid.*, s. 33(2); Sharpe, p. 36; Ontario Law Reform Commission, pp. 107-113.
3. Schedule 1, Articles 13-15.
4. Hartley, p. 59; Black, p. 31. Generally on this provision, *see* Cheshire, p. 307.

sumer is domiciled, or in the courts of the state where the supplier is domiciled. The supplier, on the other hand, may only bring action in the state where the consumer is domiciled. The parties may contract out of these provisions only in limited circumstances. The statute deals not with product liability cases, as does the Saskatchewan statute, but only with proceedings concerning a consumer contract, which would appear to exclude non-contractual claims.

In British Columbia, Rule 13(1)(o), which provides that jurisdiction may be assumed where "the claim arises out of goods or merchandise sold or delivered in British Columbia," while not directed specifically to consumer contracts, can be seen as partly alleviating the special difficulties faced by consumers.[5]

Commentary

In general, the character in which a plaintiff sues, or his connection with the territory, is irrelevant. It is the connection between the defendant and the territory, or the cause of action and the territory, which is seen to justify the exercise of the court's jurisdiction. In this sense, the rules of jurisdiction can be said to be defendant oriented. It is usually considered more reasonable that the plaintiff be required to go to the defendant's territory to prosecute a claim, than that the defendant be required to defend in the plaintiff's territory. It is also, usually, more effective since the problems of enforcement of foreign judgments are avoided.

However, in at least one class of cases, it has been perceived that the character in which the plaintiff sues may be relevant in determining what is fair and reasonable in relation to assumption of jurisdiction. When a manufacturing or distributing defendant puts into the stream of commerce products which are likely to cross state or provincial boundaries, or engages to deliver services across state or provincial boundaries, his activities may be such as to deny him the right to defend any proceeding arising out of such activities in his own territory. In such case, the supplier is perceived as being the stronger party and able by his position to impose unfair terms

5. *See* Chapter XII.

on the weaker party, or able by his financial strength to make it difficult for the weaker party to obtain a remedy.

The Saskatchewan solution to this perceived unfairness is to grant jurisdiction to the courts of the consumer's territory where the supplier has a connection with that territory, broadly, by conducting business there. The solution adopted in the European Economic Community is to give the consumer the choice of suing in the courts of his own territory or in the courts of the territory of the supplier. No other connection between the supplier and the consumer's territory need be shown.

It has been proposed by Sharpe that special jurisdictional rules ought to apply in all product liability cases, whether arising in contract or in tort.[6] The Ontario Law Reform Commission[7] has proposed that in relation to both tort and contract claims, the Saskatchewan test of "carrying on business" in the territory should be applied whether or not the product was purchased in the territory. It further recommends that a supplier be deemed to have carried on business in the territory where the product or identical products supplied by him were available with his knowledge through commercial channels, or where the supplier has acted in any way to further the supply of the product or identical product in the territory.

The Uniform Law Conference adopted a model *Uniform Product Liability Act* in 1984.[8] Under the model Act, extended jurisdiction is given where the supplier or manufacturer at the time of the supply of the product carried on business in the territory and "carrying on business" is not defined as broadly as in the Saskatchewan Act. Section 17 of the model Act provides that

> a supplier shall be deemed to have carried on business in a province where he had reason to foresee that the product, or identical products supplied by him, would be available or accessible in that province through commercial channels or where the supplier has acted in any way to further the supply of the product in that province.

The solution adopted in the European Economic Community in relation to consumer contracts, which is to allow the

---

6. Sharpe, pp. 36-38.
7. Pp. 107-113.
8. *See* 1981 Report, Appendix P; 1982 Report, Appendix Z; 1983 Report, Appendix I.; 1984 Report, p. 35 and Appendix K. Unfortunately, the report of the Manitoba and Ontario Commissioners is not printed in the 1984 report.

consumer to sue in the courts of his own domicile, is a simpler solution than the Saskatchewan one. The question is however, whether it is proper to extend jurisdiction in specific cases based upon the residence of the plaintiff? Can the peculiar problems of consumer contracts not be met under more general rules of jurisdiction referenced to the activities of the defendant in the territory? The Law Reform Commission of Ontario rejected the European Economic Community approach and adopted the Saskatchewan approach in relation to product liability claims. The reasoning of the Commission in this regard would seem to be equally applicable in regard to consumer contracts.[9]

If the proposed principles stated in Chapters IV and V are adopted, and a defendant carries on business in British Columbia, or has a place of business in British Columbia, then jurisdiction would be assumed whether the contract was a consumer contract or not. If the proposed principles stated in Chapter XII were adopted, jurisdiction would be assumed where a contract, whether a consumer contract or not, was made in British Columbia or to be performed in British Columbia. It is suggested that in cases where the defendant does not carry on business or have a place of business in British Columbia the court should not, in an action concerning a consumer contract, assume jurisdiction on the sole ground that the consumer is ordinarily resident in British Columbia. In most cases some other ground of jurisdiction will be found to apply. However, it may be proper in the case of a consumer contract to expand the concept of doing business to include the activities listed in the model Uniform Act proposed by the Uniform Law Commissioners.

Proposed Principle

15. (1) Where a claim arises in respect of a consumer contract, a defendant should be deemed to have carried on business in the province where he

(a) has reason to foresee that the product or service or identical products or services supplied by him would

---

9. *See* pp. 110-111 of the Report. The English Commissioners were, apparently, reluctant to adopt a jurisdictional rule applicable only to special plaintiffs, believing that the Rules of Court (or the Act) were not the proper place to effect social policy. However, it was politically impossible to obtain exemption from rules already in place in the E.E.C. Convention, to which the United Kingdom had adhered.

be available or accessible in the province through commercial channels; or

(b) has acted in any way to further the supply of the product or service in the province.

(2) A consumer contract is a contract for the supply of goods or services, entered into by one party for a purpose outside his trade or profession, with another party who acts in the course of his trade or profession.

CHAPTER XIV RELATIONSHIPS BETWEEN JURISDICTION AND CAUSE OF ACTION - TORT

The Rules of Court almost universally provide for jurisdiction to be assumed where the proceeding is founded upon a tort committed in the territory, and in some cases provide for assumption of jurisdiction where damage is suffered in the territory in consequence of the commission of a tort elsewhere.

British Columbia Rule 13(1)(h) provides for service *ex juris* where "the proceeding is founded on a tort committed in British Columbia."[1] The principle is that the act on the part of the defendant which gives the plaintiff his cause of complaint must have occurred within the territory and, originally, it was held that in order for a tort to have been committed in the territory, all elements of the tort must have been committed in the territory.

Where a tort is composed of more than one element, difficulty in interpreting the rule arises. The tort of negligence, for example, includes three separate ingredients:

(1) A duty of care owed by the defendant to the plaintiff,

(2) A breach of duty by the defendant, and

(3) Actual damage suffered by the plaintiff.

Since there is no such thing as negligence in the abstract, the tort is not committed until the plaintiff has suffered damage. The rule as originally interpreted was accordingly quite inadequate to cope with problems posed by claims, such as product liability claims, where the act and the consequences of the act might be separated by state or provincial boundaries.

Other tests have accordingly been suggested, such as "the last act necessary" for the commission of the tort or the commission of the "dominant element" of the tort.[2]

In *Moran* v. *Pyle National (Canada) Ltd.*[3] the Supreme Court of Canada considered the problem of the locus of a tort in the case of an alleged negligent manufacturer of defective

---

1. The same rule is found in: Alberta, Rule 30(h); Manitoba, Rule 28(h); New Brunswick, Rule 19.01(h); Newfoundland, Rule 6.07(1)(h); Ontario, Rule 17.02(g); Saskatchewan, Rule 31(1)(g); and in most States of Australia and in New Zealand, *see* Nygh, p. 35.
2. McLeod, pp. 97-102; Castel, s. 123(g); Kaye, pp. 572-573.
3. [1975] 1 S.C.R. 393, [1974] 2 W.W.R. 586.

goods. The deceased was fatally injured while removing a light bulb manufactured by the defendant. The action by the survivors was brought in Saskatchewan where the accident occurred and where the plaintiffs resided. The defendant did not carry on business in Saskatchewan. The defendant conducted its manufacturing operation entirely in Ontario and sold its products to distributors and did not sell directly to consumers. The court held that the plaintiffs' action was "founded upon a tort committed in Saskatchewan."

The court held that a test based solely on the place of acting or the place of harm was too arbitrary and inflexible to be useful in modern society. In its place the court adopted the test of a "real and substantial" connection. A tort is committed in any territory substantially affected by the defendant's activities, or its consequences, and the law of which is likely to have been in the reasonable contemplation of the parties. In the case of a foreign manufacturer, putting products into the normal channels of trade, this test will include a territory in which it was reasonably foreseeable that the product would be used or consumed.

Under the *Moran* interpretation of the rule, jurisdiction might be asserted by the territory where the breach of duty occurred, or the territory where the harm was manifested, or, possibly, the territory where the damage was suffered.[4] Each territory might arguably be a place with a "real and substantial" connection between the act and the forum, and each territory might, in appropriate cases, be a place where it could reasonably be foreseen that harm might occur. What was not decided was whether, in the case where continuing damages are suffered, it can be said that the tort was committed in a place where any of the damage was suffered.[5]

Up until 1983, the English rule read in the same terms as the British Columbia rule, but it now reads as follows:[6]

> The claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction.

This brings the English Rules of Court rule into line with the *Civil Jurisdiction and Judgments Act, 1982* and into line

4. Sharpe, pp. 15-16.
5. Fridman, p. 258.
6. Order 11, Rule 1(1)(f).

with the Convention, by identifying the place where the harm occurred as being one option and the place where the harmful act was committed as being another option.

In England, in respect of persons domiciled in a country of the European Economic Community or in another "law district" of the United Kingdom, the *Civil Jurisdiction and Judgments Act, 1982* gives jurisdiction:[7]

> ...in matters relating to tort, *delict* or *quasi delict*, in the courts for the place where the harmful event occurred, or in the case of a threatened wrong is likely to occur.

This is now also the rule in Scotland in relation to all foreign defendants.[8] The place where the harmful event "occurred" can be either the place where the damage was suffered or the place where the act which gave rise to the damage was performed.[9]

In Ontario, service *ex juris* is permitted under Rule 17.02(g) where the claim is "in respect of a tort committed in Ontario" and, under Rule 17.02(h) where the claim is "in respect of damage sustained in Ontario arising from a tort, wherever committed."[10]

Commentary

The rule as expressed in most common law jurisdictions embodies "perhaps the most complex issues in the rules allowing service *ex juris*."[11] Fridman[12] puts the problem in this way:

> A careful examination of the cases, I would suggest, reveals that the area of dispute is not so much the nature of what is being sought to establish the necessary connection between a tort...and a jurisdiction, but the identification of the features of a particular tort which satisfies the definition of what is being sought. Judges, if not textbook writers, seem to be in agreement with the proposition that there must be an important, significant nexus between the relevant act or fact and the jur-

---

7. Schedule 1, Article 5(3); Schedule 4, Article 5(3).
8. Schedule 8, Article 2(3); *see* Black, pp. 4-5, Maxwell, s. 5.59.
9. Black, p. 24; Hartley, pp. 50-52.
10. *See also* New Brunswick Rule 19.01(h) and (i). In Saskatchewan, Rule 31(1)(h) provides for service *ex juris* where the "action is founded on a tort committed outside Saskatchewan and special leave has been granted to commence the action."
11. McLeod, p. 97. The difficulties in formulating a test are discussed in Sharpe, pp. 11-16; Fridman, pp. 254-259; Hebenton; Bissett-Johnson; Cheshire, pp. 201-202; Dicey, pp. 327-329, 1382-1387, 1388-1390 and 968-972; Nygh, pp. 35-37; *Essays on Civil Procedure*, pp. 926, 945, 1003-1004.
12. P. 258.

isdiction; they are not always in agreement as to what is that connecting act or fact.

In the same article Fridman adverts to another problem which is that the answer to the question where a tort is committed may have quite different consequences in the field of substantive law from the consequences in the field of jurisdiction. In the field of substantive law, the question whether the act is wrongful at law, or justifiable, may produce different answers, depending upon whether the law of the forum or foreign law is applied. The rule in *Phillips* v. *Eyre*[13] is that the act complained of must be actionable as a tort according to the *lex fori* and must not be "justifiable" by the *lex loci delicti*. The rule has been much criticized.[14] Its existence complicates the issue, since the issue of "What is the proper law?" is not necessarily the same issue as "What is the proper forum?" though arguments have been made that the tests to be applied to each issue should be uniform.

The fact of the matter is that the question "Where is a tort committed?" can really only be answered in relation to specific torts and not generally. For example, in a libel action an appropriate *nexus* may be perceived as the place of publication; in a negligence action, the place where the defendant acted or the place where the act had effect; in a nuisance claim, the place where the damage was inflicted; in a fraudulent misrepresentation claim, the place where the statement was received. Under the *Moran* interpretation of the rule, the place at which it could have been foreseen that harm might be done, was identified as being a sufficient *nexus*.

Kaye,[15] in discussing the meaning of the phrase "the place where the harmful event occurred" which is found in the *Civil Jurisdiction and Judgments Act, 1982* and in the Convention, points out that the test embodied in this phrase raises the problem of choosing between the place of the act and the place of the damage since the expression "harmful event" may refer to either. The judgment of the European Court in *Bier B.V.* v. *Mines de Potasse d'Alsace S.A.* was that the phrase in-

13. (1870) 6 L.R. Q.B. 1.
14. *See* authorities referred to in Fridman, p. 247, notes 1, 2, 3, p. 250, note 10, p. 251, note 13; *see also* Nygh (2); The Law Commission, Part III.
15. Pp. 470-471, 572-584.

cluded both the place where the damage occurred and the place of the event giving rise to it.[16]

Order 11, Rule 1(1)(f) of the English rules, in effect, embodies this principle. It extends jurisdiction (in the case of non-Convention domiciliaries) to cases where the damage was sustained in the territory or where the act causing the damage was committed in the territory.

The English and Scottish Law Commissions[17] dealing with the definition of the *locus delicti* in choice of law cases (and not in jurisdictional cases) found much to be said for the argument that the "place of result" rule as opposed to the "place of acting" rule is more in accordance with the modern view of the law of tort, since it is thought to be just that the rights of a person who has suffered injury should be regulated according to the law of the country where the injury occurred which, in the usual case, will be the country of that person's residence. The Commissioners were, of course, concerned with identifying only one *locus delicti* since this is necessary to determine what law applies. It is not necessary to select only one *locus delicti* to determine what court has jurisdiction. It is noteworthy that the Commissioners recommended that, in the case of personal injury, death and damage to property, the "place of the result" should be considered the *locus delicti* but defined this as being the place where the conduct of the wrongdoer first impinged upon the claimant or his property and not the place where the injury became apparent or where the consequential loss occurred, since this might well depend upon where the claimant fortuitously chose to go.

The Ontario rule, which extends jurisdiction where the damage was sustained in the territory has been held to cover the case where the plaintiff incurred medical expenses after returning to Ontario following an out-of-province injury.[18]

It is suggested that the "place of harmful event" is a proper ground of jurisdiction but with the proviso that the sustaining of continuing injuries or loss in the territory, where all other elements of the tort, including the original infliction of harm, occurred elsewhere, is not an appropriate jurisdictional

16. Kaye, pp. 573-577.
17. Pp. 116-133.
18. McLeod, p. 102; Sharpe, pp. 24-25; Watson and McGowan, p. 248.

test. To extend the rule to include the place where continuing injuries or loss occur, as is now the rule in Ontario, even when tempered by the *forum non conveniens* rule, seems to constitute jurisdictional overreaching.[19]

Sharpe suggests that in all cases[20]

> ...service out of the jurisdiction should be based upon the principle that it is proper to assume jurisdiction over an extra-provincial defendant if, in light of all the circumstances, it is more reasonable to require the defendant to come to the plaintiff's province to defend than to require the plaintiff to go to the defendant's province to prosecute the claim.

In the specific context of product liability litigation, he proposes as one test[21]

> ...that the defendant knew of or could reasonably foresee distribution or use of the product within the jurisdiction...

and as another test that[22]

> ...the defendant put the product in question into the normal channels of interprovincial commerce or, because of the very nature of the product, ought to have foreseen that the product would enter the normal channels of interprovincial commerce, even though the particular jurisdiction in question was not contemplated.

The question of whether special jurisdictional rules ought to be formulated in product liability cases is discussed in the next chapter. In effect, Sharpe is embodying the specific tests set out in the *Moran* decision as applicable to a case of careless manufacture.

A more general principle enunciated in the *Moran* decision is that:[23]

> It would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in a reasonable contemplation of the parties.

---

19. *See Butkovsky* v. *Donahue*, (1984) 52 B.C.L.R. 278 (S.C.) where, in a personal injury action, the defendant driver, who was the daughter of the plaintiff, was invited to British Columbia to be served there, after service *ex juris* had been set aside by the court. Another court, invited to decline jurisdiction after the defendant had been served, held that Oregon, where the injury was sustained, could not be an appropriate forum because the limitation period had expired there. The fact that the plaintiff was suffering continuing damage in British Columbia was, apparently, considered by the original court not to constitute a head of jurisdiction under British Columbia Rule 13(1)(h).
20. Pp. 36-37.
21. P. 36.
22. P. 36.
23. [1975] 1 S.C.R. 393 at 408-409, [1974] 2 W.W.R. 586 at 598.

While Dickson, J., speaking for a unanimous court, held that "it is unnecessary, and unwise, to have resort to an arbitrary set of rules"[24] in determining where a tort has been committed, nevertheless it is apparent that practitioners ought to have some set of rules, clear if possible, arbitrary if necessary, by which they can identify the proper forum in which to sue. A rule which requires a practitioner in initiating proceedings or a court in the interlocutory stages of a proceeding to identify "the law which is likely to have been in the reasonable contemplation of the parties" can hardly be described as clear or practical. Granted that the more precision with which a rule is framed, the more arbitrary will be the exclusions from the rule, nevertheless, to frame a rule embodying the broad principles suggested by the Supreme Court of Canada may well prove to be an impossible task.

The particular circumstances which arose in the *Moran* case would be covered by the second principle proposed below as to torts in general and the question of distribution of manufactured articles across provincial boundaries would be covered by the principles proposed in the next chapter. If, in addition, the court were to be left with a discretion, as proposed in Chapter XX, it is suggested that the broad principles laid down by the Supreme Court of Canada in *Moran* would be satisfied.

Proposed Principle

16. (1) The court should have jurisdiction where the claim arises in respect of a tort and

(a) the wrongful act was committed in the province, in whole or in part; or

(b) the injury or loss or damage was first inflicted in the province.

(2) The court should not have jurisdiction by reason solely of the fact that an injury suffered by a person or by a person's property out of the province caused continuing or further loss or damage to that person or his property in the province.

---

24. *Ibid.*, [1975] 1 S.C.R. at 408, [1974] 2 W.W.R. at 597-598.

CHAPTER XV RELATIONSHIP BETWEEN JURISDICTION AND CAUSE OF ACTION - DEFECTIVE PRODUCTS

As pointed out in Chapter XIII, the Rules of Court do not generally allocate jurisdiction on the basis of a plaintiff's identity or the character in which he sues. However, in Saskatchewan, the *Consumer Product Warranties Act*[1] does extend jurisdiction over foreign manufacturers and suppliers in cases, including tort claims, involving consumer products. Both the Ontario Law Reform Commission and the Uniform Law Conference of Canada have made similar proposals for extension of jurisdiction in relation to product liability cases.[2]

Commentary

Sharpe[3] deals with the problems of jurisdiction in tort claims involving goods which have entered the flow of interprovincial trade. Having reviewed the traditional grounds of assumed jurisdiction in tort claims and having noted the deficiencies of these grounds in relation to his subject, Sharpe concludes:[4]

> Satisfying the objectives of the substantive law, which is intended to protect consumers, requires that jurisdictional rules afford the plaintiff ready access to the courts of the province in which he elects to sue, provided that province bears some significant relationship to the litigation. The plaintiff's choice will almost invariably be the province in which he resides. On the other hand, fairness to the defendant requires that some control be imposed upon the plaintiff's choice. It is suggested that the dictates of fairness are clearly satisfied if the defendant has engaged in any purposeful conduct relating to this or a similar product within the jurisdiction. Examples of such conduct are: the maintenance of any place of business, office, warehouse, agent, salesperson, or any distribution, advertising or encouragement of sales within the jurisdiction by the defendant. Even in the absence of such conduct, it is suggested that as between an injured consumer and an extraprovincial defendant, it is more appropriate to afford suit in the plaintiff's jurisdiction where the defendant should reasonably have foreseen distribution or use of its products within the jurisdiction. Moreover, it is suggested here that "foreseeability" should be

---

1. R.S.S. 1978, c. C-30.
2. Ontario Law Reform Commission, pp. 107-113; Uniform Law Conference, 1981 Report, Appendix P; 1982 Report, Appendix Z; 1983 Report, Appendix L; 1984 Report, Appendix K.
3. *Interprovincial Product Liability Litigation*, (1982), a study prepared for the Consumer Research and Evaluation Branch, Consumer Bureau, Consumer and Corporate Affairs Canada, and the Federal-Provincial Task Force on Consumer Legislative Programs.
4. Pp. 9-10.

given a broad and liberal meaning. Where the defendant puts the product into the normal channels of interprovincial trade, it will be rare that distribution or use within any one province should be considered unforeseeable. Unless the defendant has taken positive steps to ensure that the product would not reach the province in question, he should not be heard to say that this particular province was not within his contemplation.

Between an unsuspecting consumer, who can hardly be expected to ascertain the province of origin of each product he buys or uses, and a defendant who elects to exploit the interprovincial market, it seems clear that the risk of litigating in a distant place is more appropriately placed on the defendant.

Sharpe accordingly recommends:[5]

Service out of the jurisdiction ought to be permitted in any case involving a product liability claim where any of the following criteria are met:

(1) The defendant maintained any place of business, office, warehouse, agent, sales person or did any act of distribution, advertising or encouragement of distribution or sale of the product or similar products within the jurisdiction;

(2) The defendant knew of or could reasonably foresee distribution or use of the product within the jurisdiction;

(3) The defendant put the product in question into the normal channels of interprovincial commerce or, because of the very nature of the product, ought to have foreseen that the product would enter the normal channels of interprovincial commerce, even though the particular jurisdiction in question was not contemplated; or

(4) There is a claim against another party properly sued to which the defendant in question is a necessary or proper party.

The Ontario Law Reform Commission similarly concludes:[6]

We have reached the conclusion, therefore, that the present Ontario jurisdiction rules are, by themselves, inadequate to deal with modern products liability cases. In our opinion, these rules need to be supplemented by a provision specifically designed to deal with disputes that arise under our proposed principle of strict liability.

The Ontario Law Reform Commission recommended:[7]

The fundamental question seems to us to be one of distribution. In our opinion, the plaintiff should not be required to prove that the very product that caused him injury was purchased or otherwise acquired in Ontario. It should be sufficient to show that identical products of the same manufacturer or supplier were distributed in Ontario as a result of the defendant's activity in carrying on business in Ontario, as we

5. P. 36.
6. P. 110.
7. Pp. 112-113.

have defined this concept. From the defendant's point of view, the key question would seem to be whether he could foresee that identical products would be distributed in Ontario; if so, he should be aware of the possibility of proceedings being brought in the Ontario courts. It would seem to us that no unfairness would be occasioned to the defendant in so conferring jurisdiction upon the Ontario courts. On the other hand, it may be very inconvenient for the plaintiff to seek relief in some place other than Ontario. Again, we wish to repeat that this jurisdiction would be subject to the doctrine of *forum non conveniens*.

The Commission accordingly recommends that an action should be maintainable under the Draft Bill where apart from the Draft Bill the court would have jurisdiction or where the supplier at the time of the supply of the product carried on business in Ontario, whether or not the product was purchased or otherwise acquired in Ontario. We further recommend that a supplier of a defective product or a supplier of a product who makes a false statement concerning that product should be deemed to have carried on business in Ontario where the product or identical products supplied by him were available or accessible in Ontario through commercial channels with his consent, express or implied, or where the supplier has acted in any way to further the supply of the product or identical products in Ontario.

The Nova Scotia Commissioners, reporting to the Uniform Law Conference of Canada[8] adopted the recommendations of Sharpe but suggested a further rule, namely:

> Service out of the jurisdiction is permitted by a court of any province where the supplier who places the defective product in the normal channels of interprovincial trade knows or ought reasonably to foresee that a resident of that province could suffer damage as a result of a product being defective.

In the result, the Conference did not adopt the complete recommendations either of Sharpe or of the Nova Scotia Commissioners and in the Uniform Act provided that, where there is a claim arising out of the supply of the defective product which caused the personal injury or damage to the property, then jurisdiction should be extended as follows:

> **14.** An action may be brought under this Act where apart from this section the court would have jurisdiction or where the supplier at the time of the supply of the product carried on business in (the enacting province) and any party to such an action may be served out of (the enacting province) in the manner prescribed by the rules of court.
>
> **17.** For the purposes of Section 14..., a supplier shall be deemed to have carried on business in a province where he had reason to foresee that the product, or identical products supplied by him, would be available or accessible in that province

8. 1982 Report, Appendix Z.

through commercial channels or where the supplier has acted in any way to further the supply of the product in that province.

The Uniform Act does not define the words "carried on business."

If, as is suggested in Chapters IV and V, jurisdiction should be extended:

(1) In every case where a defendant or his agent has a place of business in the province and

(2) where a defendant carries on business in the province if the cause of action arose in respect of that business,

then jurisdiction would be assumed whether the claim was in respect of a defective product or not.

For those cases not falling within the proposed general rules it is suggested that the principle proposed in Chapter XIII in relation to consumer contracts be adopted in the case of claims arising out of defective goods supplied in the course of business.

Proposed Principle

17. Where it is claimed that in the course of business a defendant has supplied a product in the province which

(a) it is his business to supply;

(b) is defective; and

(c) has caused injury, loss or damage to the person or property of the plaintiff,

the defendant should be deemed to have carried on business in the province if

(d) he had reason to foresee that the product, or identical products supplied by him, would be available or accessible through commercial channels in the province; or

(e) the defendant has acted in any way to further the supply of the product in the province.

The *Rules of Court* provide that jurisdiction may be assumed over an absent defendant where an injunction is sought to prevent a threatened wrong from being done in the territory.

British Columbia Rule 13(1)(i) provides that service *ex juris* may be effected whenever[1]

> an injunction is sought as to anything to be done in British Columbia, or a nuisance in British Columbia is sought to be prevented or removed, whether or not damages are also sought in respect thereof.

Ontario[2] provides for service *ex juris* where an injunction is sought "ordering a party to do or refrain from doing, anything in Ontario or affecting real or personal property in Ontario." New Brunswick[3] makes the same provision.

The plaintiff cannot found jurisdiction by claiming injunctive relief that is only incidental to the relief that he in fact desires.[4]

If a permanent injunction is not sought then the issuance of an interlocutory injunction (*e.g.*, a "*Mareva*" injunction) is dependent upon the court having jurisdiction in the action in which the injunction is sought.[5]

Commentary

The main purpose of this provision is to allow the court to give relief locally in respect of acts done or threatened to be done within the territory, even though the acts are directed from abroad and may occur in more territories than the forum.[6]

The connection between the forum and the cause of action is an obvious one where the harm threatened, or, in the

---

1. The same rule in respect of injunctions only is in effect in: Alberta, Rule 30(i); Newfoundland, Rule 6.07(1)(i); and in England, Order 11, Rule 1(1)(b); and in most Australian States and in New Zealand, *see* Nygh, p. 40. The same rule in respect of injunctions and nuisance is in effect in: Manitoba, Rule 28(i); Saskatchewan, Rule 30(1)(i).
2. Rule 17.02(i).
3. Rule 19.01(j).
4. Cheshire, p. 195; McLeod, p. 102; Nygh, p. 39.
5. Cheshire, p. 195.
6. Nygh, p. 40.

case of nuisance, the harm being done affects persons or property in the territory and little need be said in justification of this head of jurisdiction. However, the Ontario formulation of the rule seems to be a preferable one, avoiding, as it does, the category "nuisance" as being the only named cause of action in respect of threatened harm to things in the territory.

As to interim relief, Section 25(1) of the *Civil Jurisdiction and Judgments Act, 1982* provides that a court in England may grant interim relief where proceedings have been or are about to be commenced in another state of the European Economic Community or in Northern Ireland or Scotland. Section 25(3) provides that the provisions of subsection (1) may by Order in Council be extended to proceedings commenced or to be commenced in a country not a member of the European Economic Community.[7] This provision therefore modified the rule that a *Mareva* injunction cannot be obtained where the court has no jurisdiction in respect of the substantive claim. Such an extension may be justified in the context of the European Economic Community since all courts of the Convention countries are bound to give effect to judgments of the courts of other Convention countries and it might be thought that one court has a sufficient connection with the subject matter to justify granting interim relief pending judgment in another court. Such an extension does not seem justified in Canada, in the absence of a "full faith and credit" statute, since it involves giving aid, prior to judgment, to a court whose ultimate judgment may not be recognized or enforced by the court applied to.

Proposed Principle

18. The court should have jurisdiction where the claim is for an injunction

(a) ordering a party to do or refrain from doing anything in the province; or

(b) affecting real or personal property in the province.

---

7. Hartley, pp. 125-126 and 156; Cheshire, pp. 195-196. Article 24 of the Convention specifically authorizes the exercise of jurisdiction for provisional protective measures even if the courts of another Convention country have jurisdiction over the substance of the matter.

CHAPTER XVII RELATIONSHIP BETWEEN JURISDICTION AND CAUSE OF ACTION - PERSONAL STATUS

Many proceedings are for relief which will effect a change in or a confirmation of the status of a litigant. Most common amongst this group are proceedings for divorce, judicial separation, nullity of marriage, bankruptcy, appointment of committees or guardians and adoption. A judgment in such a case is a judgment *in rem* and as such is conclusive evidence for and against all persons whether parties, privies or strangers.[1]

The common law has always treated the question of jurisdiction in matters of status in a manner differing fundamentally from the principles applied to other types of actions, though the grounds for such differential treatment have not always been clearly articulated.[2] At common law, the courts asserted jurisdiction in proceedings for the appointment of guardians of infants, and of committees of patients recognizing presence, nationality, domicile and presence of an estate each as constituting a proper ground of jurisdiction.[3] As to jurisdiction in relation to marriage, the common law rule was that the courts of the parties' domicile (which in the case of a valid marriage would be a common domicile) or the courts of the common residence had jurisdiction in proceedings for divorce and judicial separation and in nullity proceedings where the marriage was voidable and not void. In a nullity proceeding where the marriage was alleged to be void, the courts of the domicile of the petitioner or of the respondent or the courts of the territory where the marriage was celebrated had jurisdiction.[4]

Statute law now controls jurisdiction in a number of cases concerning status.

Under the *Divorce Act, 1985*, a court of a province has jurisdiction in a divorce proceeding where the petitioner or re-

---

1. Cheshire, pp. 354-356; Castel, s. 114; Gibb, Chapters VII-XIV.
2. *Essays on Civil Procedure*, p. 966; McLeod, pp. 269-270.
3. McLeod, pp. 296-297, 313-314; Gibb, pp. 133-137; Nygh, pp. 391-394, 401-402.
4. Falconbridge, pp. 676-690; McLeod, pp. 268-288; Nygh, pp. 344-345.

spondent has been ordinarily resident in the province for one year. Domicile is no longer a jurisdictional requirement.[5]

Part 2.1 of the *Family Relations Act*[6] adopts the provisions of the *Uniform Custody Jurisdiction and Enforcement Act*, recommended by the Uniform Law Conference of Canada, and provides that the court has jurisdiction in relation to custody and access where a child is habitually resident in the province, or, where not so resident, where the child is present in the province and a number of other factors are established linking the proceeding to the province.[7] The court may decline jurisdiction where it is of the opinion that it is more appropriate for jurisdiction to be exercised outside the province.[8]

Under the *Bankruptcy Act*[9] the court has jurisdiction over a debtor who at the time an act of bankruptcy occurred is resident or carries on business in Canada.[10]

The *Adoption Act*[11] makes no direct reference to the grounds of jurisdiction, but since no adoption order may be made until the child has resided for six months with the applicant, in effect the residence of the child is the ground of jurisdiction.[12]

The *Patients Property Act*[13] does not deal expressly with jurisdiction, but it is to be implied that presence in British Columbia is a sufficient ground for a declaration that the patient is incapable of managing himself. The presence of property within the territory gives jurisdiction to the court to declare that the patient is incapable of managing his affairs.[14]

Quite apart from statute and common law, British Columbia Rule 13(1)(q) provides that service *ex juris* may be effected where the proceeding is for a divorce, a matrimonial action or an adoption.[15] "Matrimonial action" is defined in Rule 1(8) to include an action under the *Divorce and Matrimonial*

---

5. *See* Bissett-Johnson and Day, pp. 21-22.
6. R.S.B.C. 1979, c. 121.
7. Section 40.
8. Section 40.2.
9. R.S.C. 1985, c. B-3.
10. Duncan, pp. 38-39.
11. R.S.B.C. 1979, c. 4.
12. McLeod, p. 311; Nygh, p. 382; Kennedy (1) at p. 371.
13. R.S.B.C. 1979, c. 313.
14. McLeod, p. 314.
15. Similar rules relating to matrimonial causes are found in: Alberta Rule 30(a); Newfoundland, Rule 6.07(1)(n); Ontario Rule 17.02(1); Saskatchewan Rule 31(1)(e).

Causes Act[16] or under the *Family Relations Act*. No further ground of jurisdiction is expressed in the rule than that the action should have been commenced in British Columbia.

Commentary

Divorce and Nullity

In relation to divorce, a divorce petition for service elsewhere in Canada need not be endorsed under British Columbia Rule 13(2) and the court has presumably no discretion to set aside service in or out of Canada or to decline jurisdiction where jurisdiction is granted by the *Divorce Act*. Rule 13(1)(q) is therefore only related to jurisdiction in actions for nullity or judicial separation. That jurisdiction now flows from section 5 of the *Family Relations Act*. Whether Rule 13(1)(q) enlarges the common law jurisdiction over valid marriages sought to be annulled or over invalid marriages sought to be declared so, is not clear. On the face of it the rule would appear to permit service *ex juris* and therefore to grant jurisdiction in cases where neither the plaintiff nor the defendant is resident or domiciled in British Columbia. The defendant would in such a case be put to the necessity of invoking the discretion of the court to decline jurisdiction or set aside service where there was little or no connection between the parties and the forum. This seems unsatisfactory. Jurisdiction in such a case should be conferred only where the plaintiff or the defendant is ordinarily resident in British Columbia.[17]

It is worthy of note that Rule 1(8) still refers to the *Divorce and Matrimonial Causes Act* which has been repealed.[18] Whether such repeal is effective is a matter of some debate. But at least the rule should refer to section 5 of the *Family Relations Act*.

Custody, Access and Guardianship

Orders in relation to custody, access and guardianship are, in British Columbia, governed by Part 2 of the *Family Relations Act*. Part 2.1 of the Act sets out the jurisdiction of the court in relation to orders made in the province and in relation

16. R.S.B.C. 1960, c. 118.
17. McLeod, p. 272.
18. *See* editorial note to s. 5 of the *Family Relations Act* contained in R.S.B.C. 1979, c. 121.

to recognition and enforcement of orders made outside the province and, indeed, outside Canada. Part 2.1 governs only custody and access orders and not guardianship orders, and the latter, unless made as ancillary to a divorce order, are governed by the common law rules as to jurisdiction. The primary basis in such case is the ordinary residence of the child within the jurisdiction.[19] Rule 13(1)(q) authorizes service *ex juris* where the proceeding is a "matrimonial action," and Rule 1(8) defines matrimonial action as meaning an action under the *Family Relations Act*. "Action" however, does not include a proceeding commenced by petition and proceedings for custody, access and guardianship under the *Family Relations Act* are commenced by petition. Accordingly, the *Family Relations Act* and not the Rules governs jurisdiction in these cases.

The rules as to jurisdiction which are set out in section 40 of the *Family Relations Act* have the virtue of being recommended for adoption by the Uniform Law Conference of Canada and of having been adopted by at least six provinces. They are carefully crafted. Habitual residence or physical presence, coupled with other indicia of a real and substantive connection, are the grounds under the Act. Domicile is not a ground. Jurisdiction in a proceeding for guardianship is not covered by the Act, but it is suggested that the same principles should be applied in the case of applications or actions in respect of guardianship, as in the case of custody and access.

Ontario Rule 17.02(k) provides for service *ex juris* where the claim is for "custody of or access to a minor." Again no other grounds of jurisdiction are set out.

Proposed Principle

19. (1) The court should have jurisdiction in a matrimonial proceeding where the plaintiff or the defendant is ordinarily resident in the province.

(2) The court should have jurisdiction in a proceeding relating to guardianship, custody of or access to a child on the grounds set out in section 40 of the Family Relations Act.

---

19. Castel, ss. 244-245.

(3) The court should in other cases have jurisdiction where the proceeding is to determine the status or legal capacity of a person ordinarily resident in the province.

CHAPTER XVIII RELATIONSHIP BETWEEN JURISDICTION AND CAUSE OF ACTION - WILLS, ESTATES AND TRUSTS

A. Grant of Probate and Letters of Administration

What is considered here is the "non-contentious" or "common-form" proceeding for the grant of probate of a will or the issuance of letters of administration.[1]

The common law rule was that foundation of jurisdiction to grant probate of a will was the presence of personal property of the deceased in the territory. In effect, this meant that the court had jurisdiction whenever a person died in the territory since, presumably, he had at least clothes to leave.[2]

The common law rule that jurisdiction in proceedings concerning title to or possession of immovable property resides exclusively in the *forum rei sitae*, dictates that the court has jurisdiction to grant probate or letters of administration in respect of the estate of a person who dies anywhere leaving immovable property in the territory. Despite this almost universal rule, English courts have assumed jurisdiction to determine incidental matters as to title to foreign land where an estate or trust is being administered in England.[3]

Commentary

The Rules of Court are silent on the question of service *ex juris* in non-contentious proceedings, presumably because no service is generally required. The question of probate jurisdiction is not specifically addressed because, presumably, applications for probate would not be made unless there were personal or real property in the territory.

Nevertheless, contentious issues can arise, requiring service, where the court requires proof of a will in solemn form[4] and there is no specific head under Rule 13 permitting service *ex juris*.[5] It would seem in such case that application would have to be made for leave under British Columbia Rule 13(3).

---

1. *See* B.C. Rule 61.
2. Gibb, pp. 107-111.
3. Cheshire, pp. 264-265.
4. *See* B.C. Rule 61 (11) to (13).
5. It is doubtful that B.C. Rule 13(1)(b) covers the matter, and clearly Rule 13(1)(a) does not.

As to personal property, it is suggested that the appropriate connection is not the existence of personal property, which may be only a small part of the estate, but the residence of the deceased at the time of death. For reasons previously advanced, residence rather than domicile is suggested as being the clearer and more appropriate test. Ontario Rule 17.02(b) relating not to common form probate but to administration actions is a suggested model.

That Rule reads as follows:

> ...where the proceeding...consists of a claim...
>
> (b) in respect of the administration of the estate of a deceased person,
>
> (i) in respect of real property in Ontario, or
>
> (ii) in respect of personal property, where the deceased person, at the time of death, was resident in Ontario;...

Proposed Principle

20. The court should have jurisdiction where there is a claim for the grant of probate or letters of administration for an estate of a deceased person in respect of

(a) real property in the province, or

(b) personal property, wherever situate, where the deceased person at the time of death was ordinarily resident in the province.

B. Probate Actions

A probate action, as opposed to a "non-contentious" or "common-form" probate proceeding, is an action for the grant of probate, or letters of administration of an estate, or for the revocation of such a grant, or for a decree pronouncing against the validity of a will.[6]

In England, jurisdiction is extended "where the claim is brought in a probate action,"[7] with no reference to the deceased's domicile or the presence of property in the territory. Order 11, Rule 3 of the 1961 British Columbia Rules, which made the same provision, was repealed by the 1976 Rules.

---

6. *See* B.C. Rule 62.
7. Order 11, Rule 1(1)(1), and *see* the former New Brunswick Rule, Order 11, Rule 3.

Commentary

By definition, some service will have to be effected in a probate action,[8] and it seems appropriate that some grounds should be expressed in the Rules for assumption of jurisdiction. These grounds should not be different from the grounds upon which jurisdiction is asserted in non-contentious proceedings or in adminstration actions. Accordingly, the proposed principle set out in respect of non-contentious proceedings is suggested as being appropriate.

C. Administration Actions

An administration action is an action by a beneficiary of a will, next of kin or creditor against an executor or administrator for the due administration of an estate or execution of a trust under the direction of the court[9] and is quite distinct from the probate proceedings dealt with in such rules as British Columbia Rules 61 and 62. The latter proceedings are for the purpose of establishing who is entitled to a grant of probate or of letters of administration.

The Rules of Court provide for assumption of jurisdiction in a proceeding for the administration of the personal estate of a deceased person who, at the time of his death, was domiciled in the territory.[10] As to the real property in the estate or trust being administered, the Rules give jurisdiction where "the whole subject matter of the proceeding is land in British Columbia."[11] But where there is both real and personal property in the estate, there is no Rule which covers the case, because the 'whole subject matter' is not land.

Commentary

It would appear to be preferable to deal both with real and personal property in such a rule and, for the reasons given above, the test of residence is preferable to that of domicile.

---

8. *See* B.C. Rule 62(4).
9. *Halsbury*, (4th ed.), vol. 17, para. 1448.
10. B.C. Rule 13(1)(e). The same rule is found in: Alberta, Rule 30(d); Manitoba, Rule 28(c); Newfoundland, Rule 6.07(1)(d); Saskatchewan, Rule 31(1)(d); in England, Order 11, Rule 1(1)(k), and in most States of Australia and in New Zealand, *see* Nygh, p.41.
11. *See* B.C. Rule 13(1)(a).

Proposed Principle

21. The court should have jurisdiction in a proceeding for the administration of the estate of a deceased person in respect of

(a) real property in the province, or

(b) personal property, wherever situate, where the deceased person at the time of death was ordinarily resident in the province.

D. Interpretation of Wills

Under the Rules of Court jurisdiction is extended to cases where it is sought to construe a will. In British Columbia, Rule 13(1)(c) provides that service out of the province may be effected wherever "it is sought to construe a will affecting personal property if the testator was at the time of his death domiciled in British Columbia."[12] British Columbia Rule 13(1)(b) provides for exercise of jurisdiction wherever "any...will... affecting land or hereditaments in British Columbia is sought to be construed, rectified, set aside or enforced."[13] Ontario Rule 17.02(c) and New Brunswick Rule 19.01(c) give jurisdiction in respect of both real and personal property in the territory, and in respect of personal property, wherever situate, of a person who died resident in the territory.

Commentary

The inclusion of wills in Rule 13(1)(b) amongst other types of instruments causes some confusion. Can wills be "rectified" or "set aside"? How is a will "enforced"? The principle that a court should have jurisdiction to construe a will affecting land is sound, but it ought to be expressed in clearer terms. Furthermore, it seems appropriate that a court should have jurisdiction to interpret a will affecting both real and personal property in the territory, as is now provided in Ontario.

---

12. The same rule is found in: Manitoba, Rule 28(e); in Saskatchewan, Rule 31(1)(b), the test is not domicile but presence of the property; in some States of Australia, and in New Zealand, the rule covers all property without reference to residence or domicile, *see* Nygh, p. 39.

13. The same rule is found in: Alberta, Rule 30(b); Manitoba, Rule 28(b); Newfoundland, Rule 6.07(1)(b); Saskatchewan, Rule 31(1)(b); in England, Order 11, Rule 1(1)(h); and in most States of Australia, and in New Zealand, *see* Nygh, p. 39.

Proposed Principle

22. The court should have jurisdiction to interpret a will and to grant consequent relief in respect of

(a) real or personal property in the province, or

(b) personal property, wherever situate, where the deceased person at the time of death was ordinarily resident in the province.

E. Trusts and Trustees

Under the Rules of Court, jurisdiction over the execution of trusts is assumed where

(a) the trust is governed by the law of the forum,[14] and

(b) where there is trust property, real or personal, in the territory.[15]

In Ontario and New Brunswick the single requirement is that there be trust property, real or personal, in the territory.[16] In jurisdictions where the double requirement is in effect, no leave can be granted where the trustee leaves the territory taking the trust property or its proceeds with him before action is commenced.[17]

Also under the Rules the court has jurisdiction to construe, rectify, set aside or enforce a deed, obligation or liability affecting land in the territory.[18]

In the European Economic Community under the Convention a trust is dealt with as though it were an artificial person and the domicile of a trust is defined in the Convention for purposes of jurisdiction.[19]

The Uniform Law Conference of Canada in its *Uniform Conflict of Laws, Rules for Trusts Act*[20] provides for the "residence" of a trust as being "the place where the administration

---

14. This single requirement is found in New South Wales and New Zealand, *see* Nygh, p. 41.
15. This double requirement is found in B.C. Rule 13(1)(f); in Alberta, Rule 30(e); Manitoba, Rule 28(e). In England, former Order 11, Rule 1(1)(e) used to have the double requirement, *see* Cheshire, p. 204.
16. Ontario Rule 17.02(d); New Brunswick, Rule 19.01(e).
17. *See* Nygh, p. 41.
18. B.C. Rule 13(1)(b).
19. *See* Hartley, pp. 31, 39.
20. 1986 Report, Appendix M; 1987 Report Appendix J.

of a trust is carried out or is principally carried out." Though this definition is supplied in the context of a "choice of law" statute and not a "jurisdiction" statute, the proposed section does treat the trust as a person, enabling the court to apply the same law to all trust property wherever situate.

Commentary

A proceeding might be brought to assert the existence of a trust, or to compel the administration of a trust or for an accounting, or to appoint or remove a trustee, or to interpret the trust document or to vary a trust.[21] Where the trustee is a defendant and is served or domiciled or resident in the territory, then rules such as British Columbia Rules 13(1)(d) and (j) will provide the jurisdiction. But where the trustee is not, the question is, what connection is sufficient to justify a court exercising jurisdiction? Is it proper to treat a trust action as an action *in rem*, the trust fund constituting the *res* over which jurisdiction is taken? This is the general principle applied in the United States. The justification for so treating a trust is that in litigation respecting trusts, frequently the beneficiaries will be in several jurisdictions, as may be the trustees, and difficulties are encountered when it is essential to bind the rights of all. So a rule giving jurisdiction to the courts of the territory where the administration of the trust is "located" satisfies the need for one forum to speak authoritatively.[22]

However, the rules of many Commonwealth countries apply the test, alone or in combination, of whether the law of the forum governs the trust. As is suggested in Chapter XII, in relation to rules giving jurisdiction where a contract is governed by the laws of the territory, a jurisdictional test which relies upon a choice of law test is not an appropriate one, because of the practical difficulty of ascertaining, before trial, what law does apply and what that law may be. Indeed, the question of what law applies, and whether the trust agreement is valid, may be governed by the laws of the place where the suit is brought,[23] thus not only putting the cart before the

---

21. The *Trust Variation Act*, R.S.B.C. 1979, c. 413, gives the court jurisdiction to vary a trust, but does not state the grounds of jurisdiction over persons or property.
22. Von Mehren, pp. 1159-1160; *Essays on Civil Procedure*, pp. 960-965. The E.E.C. approach which gives the trust a "domicile" achieves the same end.
23. *Essays on Civil Procedure*, pp. 962-963.

horse, but raising the likelihood of disparate results due to the application of different laws by different courts.

It is suggested therefore that the test based on choice of law is inappropriate and should be abandoned in favour of a test based on the presence of trust assets or the presence of the trustee, or the "residence" of a trust, in the territory.

Jurisdiction to interpret, rectify, enforce or set aside a trust, deed or agreement will be covered by Principle 14 where any of the trust property is situated in the province.

Proposed Principle

23. The court should have jurisdiction in a claim against a trustee in respect of the execution of a trust, or to appoint or remove a trustee, or for any relief or remedy which might be obtained in such a proceeding, where

(a) the assets of the trust include real or personal property in the province,

(b) the trustee is ordinarily resident in the province, or

(c) the administration of the trust is principally carried out in the province.

Provisions for assumption of jurisdiction in cases which do not fall into the general categories dealt with above appear in the Rules of Court. Considerable variation is found amongst the jurisdictions treated in this report. Those which apply or should probably apply to British Columbia are dealt with in this Chapter.

A. Actions upon Judgments

An action may be brought upon a domestic judgment as well as upon a foreign judgment. The purpose of bringing a fresh action upon a domestic judgment is to revive a judgment which may have lapsed by effluxion of time.[1] The purpose of bringing an action upon a foreign judgment is to obtain recognition and enforcement without relitigating the merits. Under the *Foreign Arbitral Awards Act*,[2] an application may be made for recognition of a foreign arbitral award, which may then be enforced as a domestic arbitral award by registration with the court as a judgment.

In all such cases, it may be necessary to serve the judgment debtor out of the jurisdiction.

In most jurisdictions service *ex juris* is permitted where the action is upon a foreign judgment. No other ground of jurisdiction is in this case specified. Accordingly, neither the presence in the territory of the judgment debtor nor of any exigible property of the judgment debtor is a requisite.[3] In some jurisdictions it is permitted as well in an action upon a domestic judgment.[4] In some jurisdictions, notably British Columbia, service may only be effected where the absent defendant has assets in the territory.[5] In England the jurisdiction is extended to "arbitral awards."[6]

---

1. *See* Law Reform Commission of British Columbia, *Report on Limitations, Part 2* (LRC 15, 1974) pp. 31-37.
2. S.B.C. 1985, c. 74.
3. Alberta, Rule 30(m); New Brunswick, Rule 19.01(m); Newfoundland, Rule 6.07(1)(m); Ontario, Rule 17.02(m); Saskatchewan, Rule 31(1)(k); England, Order 11, Rule 1(1)(m).
4. In Ontario the old rule 25(1)(m) applied only to a domestic judgment. In 1976 it was altered to include any judgment. In 1984 it was altered to include only foreign judgments.
5. B.C. Rule 13(1)(p); Saskatchewan Rule 31(1)(j).
6. Order 11, Rule 1(1)(m).

Commentary

The requirement under British Columbia Rule 13(1)(p) that there be assets of the judgment debtor in the province before an action upon a foreign judgment can be successfully prosecuted against a foreign defendant is almost unique. Where a foreign judgment is registered under either the *Court Order Enforcement Act* or the *Family Relations Act*, there is no requirement that the applicant first show that there are assets in the province. It seems an unnecessary restriction upon enforceability that in cases where an action is brought on the judgment the plaintiff must allege that there are assets in the province and, presumably, prove that there are or have his action dismissed for want of jurisdiction. The plaintiff judgment creditor in such a case can be assumed to be looking after his own interests and to be unlikely to go to the expense of bringing an action upon a judgment in a territory where the defendant neither resides nor has assets without some good reason. He may believe that the absent defendant will in the future acquire assets in the territory, or he may believe that he can garnishee wages or other debts which are not "assets." These are perfectly proper motives for registering a foreign judgment or for bringing action upon a foreign judgment. The search for assets may be made procedurally easier where the judgment creditor has obtained an enforceable judgment in the territory, since he then has a number of remedies which are designed to disclose the existence of assets.

Proposed Principle

24. The court should have jurisdiction where the claim is brought to enforce any foreign judgment or arbitral award without any requirement that there be assets in the province.

B. Taxes

In most jurisdictions service *ex juris* is permitted where the claim is for Crown or municipal taxes or debts. British Columbia Rule 13(1)(l) makes such provision.[7] Since the Crown cannot sue for taxes in a foreign court this jurisdiction is clear-

7. The same rule is in effect in: Ontario, Rule 17.02(r); New Brunswick, Rule 19.01(r); Saskatchewan, Rule 31(n); England, Order 11, Rule 1(1)(n).

ly justified. It is less obviously justifiable in an action for debt not of a revenue nature. However, given the fact that most debts owed to the Provincial Crown will have been incurred in British Columbia, or because of the presence of property located in the province, the broad rule as to debts seems justifiable.

Proposed Principle

25. The court should have jurisdiction where the claim is brought on behalf of the Crown or a municipality to recover moneys owing for taxes or other debts.

CHAPTER XX

GENERAL DISCRETION TO ASSUME JURISDICTION

Many jurisdictions provide by Rules of Court that the court may authorize service *ex juris* in cases not specifically provided for by the rules.

British Columbia Rules 13(3) and (4) provide as follows:[1]

> (3) In any case not provided for in subrule (1), the court may grant leave to serve an originating process or other document outside British Columbia.
>
> (4) An application for leave to serve a person outside British Columbia shall be made before the originating process or other document is served and shall be supported by an affidavit or other evidence showing in what place or country that person is or probably may be found and the grounds upon which the application is made....

No criteria for the exercise of this discretion are set out in the Rules.

In Nova Scotia, Prince Edward Island and the Federal Court all attempts to define and limit in advance cases in which jurisdiction will be assumed over foreign defendants have been abandoned and the matter is left entirely to the discretion of the court to be exercised in some cases before service of the process and in some cases after. In Nova Scotia and Prince Edward Island[2] the Rules provide that process may be served anywhere in Canada or the United States without leave, and, with leave, anywhere else. The Federal Court Rules similarly permit service with leave out of Canada without laying down any criteria.[3]

Under the Federal Court Rules it has been held that the discretion afforded by the rule is appropriately exercised upon consideration of *forum conveniens*.[4] This principle has also been applied where application to set aside service made without leave has been brought under the Nova Scotia and Prince Edward Island Rules.[5]

---

1. Similar rules are found in: Saskatchewan Rule 31(2); Ontario Rule 17.03; New Brunswick Rule 19.02; in England,where there is no such rule, it has been held that the court has no power to create new bases of jurisdiction, *see* Cheshire, p. 215.
2. In each case Rule 10.07.
3. Federal Rule 307.
4. *Antares Shipping Corp.* v. *The Ship "Capricorn,"* [1977] 2 S.C.R. 422, 435 - 437.
5. *Warren* v. *Robinson*, (1982) 31 C.P.C. 305 (N.S.S.C., A.D.); *Notsa Engineering (Canada)* v. *Coles Express*, (1981) 84 A.P.R. 181 (P.E.I.S.C.).

Commentary

Is there a case to be made for the approach that all considerations as to jurisdiction are, in effect, considerations as to venue and that the question to be asked should not be "What connection gives the court power over this defendant?", but "Are the courts of this territory the most convenient courts in which to try this action?" This comes very close to the position under the Rules in Nova Scotia, Prince Edward Island and the Federal Court.

It seems wrong both in principle and in practice to abandon all attempts to categorize those cases where sufficient connection exists between the litigants or the cause of action and the territory and to leave it to the judgment of the court upon application of the plaintiff or upon the objection of the defendant to determine whether such a connection exists, and if so, whether the court is the appropriate forum to try the issue. Such a rule seems productive of more problems than solutions. Firstly, litigants could never be confident that they had a *prima facie* right to initiate their proceeding in the territory, and limitation periods might expire before the issue was resolved. Secondly, if judgment were given in default, an enforcing court in another territory might be deprived of any recourse to a set of rules or a considered decision by the rendering court to determine whether that court had assumed jurisdiction upon internationally accepted principles. Finally, the expense involved to foreign defendants in having to come to the territory to dispute untenable claims to jurisdiction would outweigh any legitimate advantages to plaintiffs flowing from a right to make unrestricted claims to jurisdiction.

What then should be the criteria for exercising the residuary jurisdiction set out in Rule 13(3)?

There are few decided cases on British Columbia Rule 13(3), which was only introduced with the Rules of 1976. In two cases in which this subrule was invoked the argument that the court should assume jurisdiction solely on the basis that it was the *forum conveniens* was rejected.[6] In another case the court exercised its discretion because the British Col-

6. *Davidson* v. *The Anchorage Inc.*, (1980) 23 B.C.L.R. 352 (S.C.); *Brydon* v. *Perrine*, (unreported) November 15, 1978, Vancouver B781208 (S.C.).

umbia choice of law rules indicated that the law to be applied to the substantive issues was British Columbia law.[7]

In *Antares Shipping Corporation* v. *The Ship "Capricorn"*[8] Laskin C.J.C. suggests that the particularized rules of the provinces, such as British Columbia Rule 13, might be used as a guideline in the exercise of a discretion under the Federal Court Rules but that the essential element will still be that the court is the appropriate forum.

That the court should in the exercise of a discretion under Rule 13(3) look to whether there is a nexus with the forum and to whether the British Columbia court is the appropriate forum is clearly a satisfactory principle.[9] Other grounds of connection might be that the applicable law will be the forum law. The crucial element should, however, still be that the forum is appropriate.

In the context of the Canadian federation it has been held that the court should more readily assume jurisdiction over a Canadian defendant than it would over a non-Canadian defendant.[10] If, as is suggested in Chapter XXI, the real search is for the appropriate forum, then a court which determines that it is the appropriate forum should not abandon or refuse to take jurisdiction simply because the action does not fit exactly into one of the categories provided by rule or statute.

Proposed Principle

26. In cases not expressly provided for by Rule, the court should assume jurisdiction:

(a) over a defendant not resident in Canada, where there is a real and substantial connection between

(i) the cause of action;

(ii) the subject matter of the proceeding; or

(iii) the defendant

---

7. *McDonald & Sons* v. *Export Packers Co.*, [1979] 2 W.W.R. 764 (B.C.S.C.). For commentary on these cases *see* Edinger (2).
8. *Supra*, note 4.
9. Edinger (2), at pp. 5-9.
10. *Jannock Corp.* v. *R.T. Tamblyn & Partners*, (1975) 58 D.L.R. (3d) 678, 688 (Ont. C.A.). *See* further cases in Edinger (2) at p. 27.

and the province and the court is an appropriate forum to hear the proceeding,

(b) over a defendant resident in Canada where the court is the most appropriate forum in Canada to hear the proceeding, and

(c) over a defendant present in Canada where there is no other appropriate forum to hear the proceeding.

CHAPTER XXI

GENERAL DISCRETION TO DECLINE JURISDICTION

Even though a court has power to try a proceeding, either under common law rules of jurisdiction or the assumed jurisdiction given by Rules of Court, it can refuse to take jurisdiction. This power is derived from two sources:

(1) The power to stay proceedings over which the court has undoubted jurisdiction or to enjoin a party from proceeding in a foreign tribunal is derived from the court's inherent jurisdiction which is often now preserved by statute.[1]

(2) The power to decline to take jurisdiction is derived from the Rules of Court. In those states where under the Rules of Court leave is required to serve process out of the territory, as well as in those states where leave is not required, but the defendant may apply to set aside the service, the courts may, rather than must, assume jurisdiction. The exercise of assumed jurisdiction under the Rules of Court therefore lies within the discretion of the court.[2]

In Ontario, the power to stay proceedings or to decline jurisdiction on the grounds of *forum non conveniens*, where a party has been served out of Ontario is embodied in the Rules.[3] In British Columbia the matter is not as clearly addressed in the Rules, but two separate Rules bear upon such power, namely, Rules 13(10) and 14(6).[4]

A question arises concerning Rule 13(10). Is the decision to set aside service made by determining whether the facts fall within one of the particularized grounds for service *ex juris*? Or does the court have a discretion to set aside or not as it sees fit? This is a matter of debate.[5] But since Rule 14(6) clearly authorizes the exercise of a discretion, the answer to the debate is of limited importance. Nevertheless, which Rule is relied upon may be of importance since the result of a successful

1. *See* for example s. 8 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224 and s. 49(3) of the *Supreme Court Act*, 1981, U.K. *See also* Cheshire, p. 221; McLeod, p. 119. As to enjoining a foreign proceeding, *see* Cheshire, p. 244.
2. Cheshire, p. 205; McLeod, pp. 85-86, 88-89. The exercise of common law jurisdiction is not discretionary. Dicey, pp. 305-306.
3. Ontario Rule 17.06; *see also* s. 49 of the New Zealand *Code of Civil Procedure*.
4. *See* Edinger (2), pp. 10-12.
5. Edinger (2), pp. 10-12; Edinger (3), pp. 300-301.

application under Rule 13(10) is that the action remains, though service is set aside, whereas under Rule 14(6), a successful application will result in the dismissal or a stay of the proceeding.

Under Rule 14(6), subparagraph (c) puts in issue both the existence of jurisdiction and the discretion whether to exercise it or not.[6]

It is curious that the only remedy authorized by Rule 14(6) is a declaration. Presumably, armed with such declaration a party may then apply to dismiss the action for want of jurisdiction[7] or to stay the proceeding.[8] The existence of two Rules both giving a discretion to decline jurisdiction is confusing. Both Rules purport to derive from English Order 12, Rule 8 (as it read in 1975), but it is clear that they also both derive from Marginal Rule 100 of the 1961 Rules of Court. The Rules should be amalgamated and the remedy consequent upon a finding of "no jurisdiction" or a finding of "jurisdiction declined" should be spelled out.

Rule 13(3) which permits the court in the exercise of a discretion to assume jurisdiction in cases not provided for in the Rules, also has some bearing on the extent of the powers to be exercised under Rule 13(10) and 14(6), since many of the same factors will operate on the court's decision not to assume jurisdiction under Rule 13(3) as will operate upon a decision to decline jurisdiction under Rule 14(6)(c).[9]

A. *Forum Non Conveniens* - Adoption of Principle

Because the exercise of a court's power to decline, or to refuse to assume jurisdiction has flowed from two different sources, different considerations have historically been applied. They can be summarized as follows:

(1) Upon an application for leave to serve *ex juris* the plaintiff must establish, not only that the facts of the case fall within the prescribed grounds, but also that

6. *Petersen* v. *Ab Bahco Ventilation*, (1979) 107 D.L.R. (3d) 49 (B.C.S.C.).
7. *E.g.*, under B.C. Rules 18, 18A or 34.
8. Fraser, s. 21.15.
9. Watson and McGowan, *Commentary on Rule 17.03*; Edinger (2), pp. 5-9.

the case is an appropriate one for the court to take jurisdiction.[10]

Upon an application for a stay of proceedings, the defendant must establish that the continuance of the proceeding would be vexatious or oppressive or an abuse of process.[11]

(2) Upon an application for leave to serve *ex juris*, the discretion is one which is exercised with caution, resolving doubts in favour of the defendant and applying the spirit rather than the letter of the law.[12]

Upon an application for a stay of proceedings, the burden is on the defendant to show that the continuance of the proceedings will cause a substantial injustice to the defendant. The burden on the plaintiff is only to show a possibility of advantage by prosecuting the action in the territory. The court's jurisdiction to stay proceedings is to be used sparingly.[13]

As a generalization, it is fair to say that upon applications by plaintiffs for the assumption of jurisdiction the decisions of the courts were defendant-oriented. Upon applications by defendants for the decline of jurisdiction the decisions of the court were plaintiff-oriented.[14]

However, concealed in the earliest decisions, but emergent in more modern decisions, in both classes of case, was the question, not simply whether there was an appropriate connection between the *lis* and the *forum*, or not simply whether the plaintiff was abusing the court's process, but whether the court was the appropriate tribunal to try the proceeding where there was an opportunity to try it elsewhere.

The Scottish doctrine of *forum non conveniens*, long recognized as a plea in bar which could be raised by the defender, while never adopted in its pure form in English law, was recognized as addressing a valid concern. In a contest over the ex-

10. Cheshire, p. 205; Dicey, pp. 306-308; McLeod, pp. 85-86; Castel, s. 122; Inglis, pp. 390-391.
11. Dicey, pp. 389-393; McLeod, pp. 119-123; Castel, s. 131. The B.C. Court of Appeal, however, seems to have departed from this position in *First City Investments* v. *Shrum, Liddle & Hebenton*, (1988) 26 B.C.L.R. (2d) 46.
12. Dicey, pp. 305-306; McLeod, pp. 85-86; Castel, s. 122; Collins, p. 658.
13. *Avenue Properties* v. *First City Developments Corp.*, (1986) 32 D.L.R. (4th) 40, 44-47 (B.C.C.A.). Dicey, pp. 393-395; McLeod, pp. 131-132; Castel, s. 131.
14. Edinger (3).

ercise of jurisdiction, the question whether there was a sufficient connection, was for many purposes the same question as whether there was a more appropriate forum, that is one with better connections. In the case of a contest over abuse of process, the finding that there was a more appropriate forum often led to the conclusion that the choice of an inappropriate forum was vexatious.[15]

The question whether there is a doctrine of *forum non conveniens* in the common law is still being asked,[16] although the matter in England may now have been put to rest by the decision of the House of Lords in *The Abidin Daver* [1984] AC 398, in which Lord Diplock said that England has adopted the Scottish principle of *forum non conveniens.*

Regardless of the merits of the debate there is no doubt that the principle of *forum non conveniens* has been applied everywhere in the common law world, though in more or less diluted form.

B. *Forum Non Conveniens* - The Test

The plea as it has been developed in Scottish law has been expressed as follows:[17]

> That for the interests of all the parties, and for the ends of justice, the cause may be more suitably tried elsewhere.

The Supreme Court of Canada has expressed the common law principle as follows:[18]

> Whether there exists some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice.

This principle was first accepted in English law in cases where leave was sought for service out of the jurisdiction. The chief factors to which weight was to be given were eventually recognized as being:[19]

---

15. Inglis.
16. For Canada *see* Edinger (2); Edinger (3); Edinger (4); McLeod, pp. 132-134; Castel, s. 132; for Quebec, *see* Meyer; for Australia, *see* Nygh, pp. 59-64; for the U.S.A. *see* Barrett; Blair; Dainow; Ehrenzweig, pp.120-139. The debate had also raged in England, *see* Collins; Inglis.
17. Inglis, p. 384; Anton, pp. 149-150; Gibb, Chapter XVI.
18. *Antares Shipping Corp.* v. *The Ship "Capricorn,"* [1977] 2 S.C.R. 422.
19. Castel, s. 133; McLeod, p. 124; Edinger (3), p. 287, note 16.

(1) Whether there is a foreign court which has jurisdiction over the parties.

(2) Whether proceedings have in fact been commenced elsewhere.

(3) Whether the cause of action arose in or the subject matter of the action is situated in the territory.

(4) Whether foreign law would be applied to the substantive issues.

(5) Whether the local court can enforce and supervise a judgment.

(6) Where the parties and their witnesses are located.

(7) The relative expense of proceeding locally or elsewhere.

(8) The availability of compulsory process to secure the attendance of witnesses.

(9) The possibility that a view might be required.

(10) The consideration of congested court rolls and inconvenience to other litigants with greater claims to access.

(11) The burden of jury duty on the people of the community having no relation to the litigation.[20]

The doctrine was less readily accepted in cases where jurisdiction was non-discretionary, that is to say where service in the territory founded jurisdiction or where submission founded jurisdiction. In such case, the defendant having to point to some element of vexation or abuse or unfairness was met with a stiffer test. It was not sufficient to show that the forum chosen by the plaintiff was less appropriate than some other available forum. The court had also to be satisfied:

(1) That there was another forum to whose jurisdiction the defendant was amenable where justice could be done between the parties at substantially less inconvenience and expense, and

20. As to whether administrative convenience is a proper objective, *see* Edinger (3), pp. 288-292; Meyer, pp. 595-596; Birnbaum.

(2) That a stay of proceedings would not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him in the chosen forum.

This formulation of the test was enunciated by the House of Lords in the *MacShannon* case and was adopted by the British Columbia Court of Appeal in the *Rogers* case and in the *Avenue Properties* case.[21]

In the British Columbia Court of Appeal the test was said to involve a weighing of "the right of the plaintiff to bring the action in British Columbia" against "whether the action in British Columbia would cause a severe injustice to the defendant."[22]

In some provinces the *MacShannon* test has been adopted without modification and in some rejected in favour of the old "abuse of process" test.[23]

What is meant by a "legitimate personal or juridical advantage"?

The requirement that the advantage be "legitimate" was probably intended to discourage "forum shopping."[24] But, in effect, the adjective simply emphasises that, in the context of an application for a stay of proceedings, vexation or harassment are to be prevented and that the court may inquire whether the plaintiff has an ulterior motive.[25] One would expect that the same considerations would apply in the context of an application for leave to serve *ex juris* or for setting aside service *ex juris*.

The principle that a "personal" advantage can offset a finding that some other forum is more appropriate is difficult to comprehend. Where the plaintiff is a resident of the forum, it will usually be to his personal advantage to litigate on his home territory, where he is familiar with the law and the law-

---

21. *MacShannon* v. *Rockware Glass*, [1978] A.C. 795 (H.L.); *Rogers* v. *Bank of Montreal*, (1984) 4 D.L.R. (4th) 507; *Avenue Properties* v. *First City Development Corp.*, *supra*, note 13; *see* Edinger (3); Cheshire, pp. 221-237; Dicey, pp. 389-395.
22. *Rogers* v. *Bank of Montreal*, *ibid.*; applied in *Butkovsky* v. *Donahue*, (1984) 52 B.C.L.R. 278 (S.C.), *Delbreuck & Co.* v. *Muenzenberg*, (1984) 54 B.C.L.R. 264, (S.C.) and in *Glenbrook Developers* v. *Gatley*, [1984] 6 W.W.R. 450 (B.C.S.C.); for Alberta, *see Mohler* v. *Dairy Queen of Western Canada*, [1976] 3 W.W.R. 619 (Alta. S.C., A.D.).
23. Edinger (2), pp. 21-29; Edinger (3), p. 290; Castel, s. 132, note 22.
24. Edinger (3), pp. 293-297.
25. Cheshire, pp. 230. Lord Scarman in *Castanho* v. *Brown and Root (U.K.)*, [1981] A.C. 557, 575 (H.L.) said that "time should not be spent in speculating about the meaning of 'legitimate advantage'."

yers, where he does not have to give instructions at a distance and does not have to travel to trial. But these are matters which are to be taken into account when determining whether there is a more appropriate forum than the one chosen by the plaintiff. That is to say, the considerations of personal advantage appear to belong to the first stage of the inquiry and not to the second stage where the question is, despite the existence of a more appropriate forum, should a stay be denied?[26]

The principle that a "juridical" advantage can offset a finding that some other forum is more appropriate is easier to comprehend, but less easy to justify. The concern expressed by the courts about "forum-shopping" would seem to lead to the conclusion that, all other things pointing toward another forum as being appropriate, the plaintiff should be discouraged, if not prohibited from selecting an inappropriate forum for the sake of some perceived substantive or procedural advantage. "Obtaining an advantage, after all, is what forum shopping is all about."[27]

Some examples of what has been suggested or held to be a "legitimate juridical advantage" may serve to illustrate the point. It has been suggested it is a legitimate juridical advantage:

(1) That the Court would apply choice of law rules which would result in a summary judgment for the plaintiff.[28]

(2) That the plaintiff could obtain security for the amount of his claim.[29]

(3) That the plaintiff could obtain a cheaper or quicker trial.[30]

(4) That the plaintiff could obtain higher damages, or an award of interest, or could take advantage of a more generous limitation period.[31]

---

26. Edinger (3), pp. 285-287, 292.
27. Edinger (3), p. 293.
28. *Power Curber International* v. *National Bank of Kuwait*, [1981] 1 W.L.R. 1233 (C.A.).
29. *The Atlantic Star*, [1974] A.C. 436 (H.L.).
30. *MacShannon* v. *Rockware Glass*, *supra*, note 21.
31. *Spiliada Maritime Corp.* v. *Cansulex*, [1986] 3 All E.R. 843 (H.L.).

(5) That the plaintiff could obtain better pre-trial discovery procedures.[32]

(6) That the judiciary in the alternative forum is not independent.[33]

(7) That the substantive law of the forum is more favourable to the plaintiff.[34]

It has been doubted that it is a legitimate juridical advantage:

(1) That the plaintiff could proceed upon the basis of a contingency fee agreement.[35]

(2) That the plaintiff believed he might obtain a higher level of damages.[36]

Commentary

In England, the distinction between the two tests has been virtually eliminated. In *Spiliada Maritime Corp.* v. *Cansulex Ltd.*,[37] the House of Lords said of Lord Diplock's formulation of the rule in the *MacShannon* case that it was "a tentative statement at an early stage of a period of development." The court in that case was asked to decline jurisdiction and grant a stay where service had been effected within the jurisdiction. It is clear from the decision that the same basic criteria apply in England in cases involving stays of action as in cases involving the exercise of a discretion to serve the writ out of the jurisdiction.

The present English position as a result of the *Spiliada* case has been formulated by Professor North as follows:[38]

> The court is required to consider four elements in exercising a discretion to stay:
>
> (1) The appropriate forum. If there is clearly a more appropriate forum than an English forum, then the court must go on to consider:

---

32. *Bank of Tokyo Ltd.* v. *Karoon*, [1987] A.C. 45 (C.A.); *General Dynamics Corp.* v. *Veliotis*, (1985) 53 O.R. (2d) 371 (H.C.).
33. *The Abidin Daver*, [1984] A.C. 398 (H.L.).
34. *Pindling* v. *National Broadcasting Corp.*, (1984) 48 O.R. (2d) 58 (H.C.).
35. *Castanho* v. *Brown and Root (U.K.)*, *supra*, n. 25.
36. *MacShannon* v. *Rockware Glass*, *supra*, note 21.
37. *Supra*, n. 31; Edinger (4). The *Spiliada* story starts in Vancouver, where, it was alleged, wet sulphur was loaded on the ship which damaged it. The B.C. *Limitation Act* was more favourable to the defendants than the English Act.
38. Cheshire, pp. 185-186, 221-237.

(2) Other relevant circumstances, including whether by staying the proceedings the plaintiff will be deprived of some advantage that he would obtain by trial in England. If there is no substantial advantage to the plaintiff and the natural forum is abroad, a stay will be granted. If there is a clearly more appropriate forum abroad, and the plaintiff would obtain a substantial advantage from a trial in England, then the court must go on to consider:

(3) The balance between the two elements. The courts must weigh the appropriateness of trial abroad against the advantages to the plaintiff of trial in England. But the principle is that unless there are circumstances by reason of which justice requires that a stay should not be granted, preference should be given to trial in the more appropriate forum. If, however, there are proceedings between the same parties and the same issues continuing simultaneously in two different countries, then the court should take into account:

(4) The multiplicity of proceedings. In order to obtain a stay in a *lis alibi pendens* case it only has to be shown that the alternative forum is a natural forum rather than the natural forum and any advantage to the plaintiff of proceeding in England must be of such a fundamental nature that to deprive the plaintiff of it would amount to a positive injustice. It does not, however, matter in principle whether the action is first commenced in England or abroad.

The question whether the decision in *Spiliada* will be applied in British Columbia has not yet been fully considered. The decision was cited with approval in *First City Investments* v. *Shrum, Liddle & Hebenton*,[39] but only as to the test for determining what was the natural forum. The question of "juridical advantage" was dealt with, confusingly, as though it were part of the enquiry as to what was the natural forum.

If the decision is applied then the difference between the tests to be applied when service *ex juris* is made and the test to be applied where service within the jurisdiction is made or contractual submission is the ground, may be minimal. It is clear that the fundamental criteria for the exercise of the discretion to allow service *ex juris* and the exercise of the discretion to stay proceedings ought to be the same, although there are differences in respect of the burden of proof and in respect of the fact that rules permitting service *ex juris* are still regarded as an "exorbitant" form of jurisdiction.[40]

The decision in *Spiliada* makes eminent sense. The way in which the issue of *forum conveniens* comes before the court

39. *Supra*, n. 11.
40. Cheshire, pp. 205-212.

may be purely fortuitous. A defendant may be served in the jurisdiction or out of the jurisdiction but the connective factors or lack of them may be the same in both cases. It does not seem right that the defendant should be met with a greater burden of showing that the court is *forum non conveniens* in the one case than in the other. Similarly where proceedings have been commenced elsewhere, it would appear to be wrong to place a premium upon who first starts the action.

It has been strongly suggested that the distinction between the two tests is not maintainable.[41] The leading Canadian texts assert that there is no distinction in Canada.[42] Indeed, in some cases the courts have applied the *MacShannon* test where the issue of service *ex juris* was involved and not the issue of a stay of proceedings.[43]

At least within Canada it is suggested that the tests should be the same. There can be no doubt that the parties will have roughly the same procedural advantages in whichever province the case is tried. The substantive law, so far as it is common law, is the same in nine provinces and two territories, and not significantly at odds with the norms of Canadian society in Quebec. Statute law tends to be the same. Choice of law rules are substantially the same. Expert evidence in "foreign" provincial law, if needed at all, is readily available. The costs and inconvenience of doing legal business in another province of Canada are no greater than the costs and inconvenience of doing non-legal business in another province of Canada.

Many courts have recognized that in assuming or declining jurisdiction the fact that the "foreign" element is a Canadian element is a matter that may put the question beyond the usual rules. The fact that the defendant is a Canadian ought to justify a court in exercising less caution in asserting jurisdiction and less reluctance to stay a local action in favour of a Canadian forum.[44]

---

41. Inglis; Edinger (3), pp. 298-299.
42. Castel, ss. 119, 131-133; McLeod, pp. 86-88, 132-134; Dunlop, pp. 482-484.
43. Edinger (3), pp. 300-301.
44. *See* Edinger (3), p. 301, note 58; Sharpe, pp. 66-67. In *Re Wismer and Javelin International*, (1981) 132 D.L.R. (3d) 156, 163 (H.C.), Hughes, J. said that it was "...quite inaccurate to talk about the sovereignty of the Province of Ontario and the sovereignty of the Province of Quebec," and that considerations of an invasion of a foreign sovereignty do not apply in a contest between the provinces of a federal state.

While it may be that the common law is slowly working out the questions of assuming and declining jurisdiction in light of modern day conditions and should be left to do so, there is little justification for allowing anomalies to continue in Canada indefinitely.

It is suggested therefore that in a choice between a local and a foreign forum both of which are within Canada the question should be decided upon a basis of which is the most appropriate forum to try the matter and regardless of personal or juridical advantage.

In relation to applications for an injunction to restrain the pursuit of foreign proceedings, the court does not proceed on the same principles as those applied when granting a stay of proceedings. The court will not enjoin a party from proceeding in a foreign jurisdiction on the sole ground that the domestic court is the natural forum. Vexation and oppression are the principal tests to be applied in such case.[45]

Proposed Principle

27. (1) The court should decline jurisdiction where there is another forum which is a more appropriate forum for the conduct of the proceeding and for securing the ends of justice.

(2) Where the other appropriate forum is in Canada, the court should not decline jurisdiction if the plaintiff shows that it is more reasonable to require the defendant to defend the proceeding in the province than to require the plaintiff to bring the proceeding elsewhere in Canada.

(3) Where the other appropriate forum is out of Canada, the court should not decline jurisdiction if the plaintiff shows that he would obtain a substantial juridical advantage in bringing the proceeding in the province.

(4) Where proceedings involving the same cause of action and between the same parties or some of the same parties have already been commenced in a more appropriate forum in Canada, the court should decline jurisdiction in favour of the more appropriate forum unless the bringing of such other proceeding is vexatious or an abuse of process.

---

45. *Societe Aerospatiale* v. *Lee Kui Jak*, [1987] 3 W.L.R. 59 (P.C.); Edinger (4).

C. Terms Upon Which a Stay Should Be Granted

Where a stay is granted in favour of a more appropriate forum, there are certain practical considerations which a court must take into account. The proposed alternative forum may itself decline jurisdiction. The period of limitation may have expired which would render the alternative forum incapable of dealing with the matter unless the defendant waived the limitation period. The judgment of the alternative forum may not be one which is enforceable in British Columbia under the present rules of recognition and enforcement of judgments. The court may have to retain jurisdiction over some aspects of the proceedings, such as costs or interest.

It is suggested that some of these practical matters ought to be spelled out in the Rules wherever a stay of proceedings is granted in favour of a more appropriate forum, for the guidance of the court and of the practitioner.

Proposed Principle

28. In declining jurisdiction the court should in appropriate circumstances stay the proceeding upon terms such as:

(a) That the defendant shall in writing agree to submit to the jurisdiction of a named court and, if appropriate, waive any limitation bars.

(b) That the defendant shall in writing submit to the jurisdiction of the court to enforce any judgment of the named court, whether final or not, and whether for payment of money or not.

(c) That the defendant shall in writing submit to an order for costs or interest by the court in place of or in addition to an award of costs or interests made by the named court.

(d) That the defendant shall put up security for any additional costs that the plaintiff may be put to by reason of a change in forum.

(d) That the court may upon good cause shown by the plaintiff set aside the order for a stay of proceedings.

(e) That the defendant shall submit to orders of the court for interim relief or protective measures pend-

ing adjudication in the named court and to a continuation of such relief or measures despite the order for a stay of proceedings.

CHAPTER XXII

RECOGNITION AND ENFORCEMENT OF JUDGMENTS

When considering whether to rely upon the extended jurisdiction of the court conferred by the Rules to sue an absent defendant, a plaintiff must consider whether, if the defendant does not attorn to the jurisdiction, any judgment taken in default will be enforceable in a jurisdiction where the defendant resides or has assets. Similarly, a court considering whether to assume or to decline jurisdiction over an absent defendant must give weight to the consideration whether any judgment it may pronounce will be given effect in another jurisdiction. If not, the court may conclude that it is not the *forum conveniens*.

The relationship between the subject of jurisdiction over foreign defendants and the subject of the recognition and enforcement of foreign judgments is accordingly an obvious one. It is not proposed in this study to make a thorough review of the topic of recognition and enforcement of foreign judgments, but to address only some issues which have a direct bearing upon the question of the law as to the jurisdiction of British Columbia courts in matters involving foreign elements.

"Recognition" and "enforcement" of a foreign judgment refer to two distinct aspects of the same question.

Recognition refers to the question whether the court will give final legal effect to a result reached by a judgment in a foreign jurisdiction. If so, relitigation of the dispute is precluded.

Enforcement refers to the employment of the machinery of the court to give the judgment creditor some form of affirmative relief. Recognition is obviously a precondition to enforcement, though it may not require any separate act or proceeding to secure recognition before enforcement may be sought.[1]

---

1. McLeod, pp. 580-581; Sharpe, p. 39.

A. Recognition

1. At Common Law

The principles of recognition at common law are relatively rigid and simple.[2] The first question is whether the foreign court had jurisdiction in the international sense of the word.

(a) Judgments in Personam

Jurisdiction in the foreign court will only be recognized where:

(1) The defendant was present within the territory of the foreign court when the proceeding was commenced; or

(2) The defendant voluntarily submitted to the jurisdiction of the foreign court.

As pointed out in Chapter I, "presence" in the case of a person includes residence and may include domicile or nationality and may include mere presence coupled with personal service. "Presence" in the case of an artificial person includes carrying on business in the territory.[3]

"Submission" is found where:

(1) The defendant voluntarily appeared to defend the foreign proceeding;

(2) Where the defendant in the character of the plaintiff selected the forum in which he is afterwards sued; and

(3) Where the defendant has contracted to submit himself to the jurisdiction.[4]

(b) Judgments in Rem

A judgment *in rem* is not confined to a judgment in respect of a physical thing. An *in rem* judgment is a judgment

---

2. The following discussion has been included to provide some background on the traditional common law principles. Insofar as British Columbia is concerned, however, these have been altered by the Court of Appeal in the *Morguard* decision: *see* text *infra* at n. 33.

3. McLeod, pp. 584-587; Cheshire, pp. 341-343, 351-354; Nygh, pp. 84-86; Read, Chapter V; McLean & Patchett, s. 2.39.

4. McLeod, pp. 587-595; Cheshire, pp. 343-351; Nygh, pp. 86-90.

determining the status of a person or thing such as a decree of divorce or nullity, condemnation of a ship in admiralty, and judgments determining title to immoveables or vesting property in moveables given as security or moveables included in a bankrupt or deceased's estate.[5]

Jurisdiction in the foreign court will only be recognized where

(1) The property, whether moveable or immoveable, was situate in the territory of the foreign court;

(2) The deceased or bankrupt was domiciled in the territory of the foreign court; or

(3) The married person was domiciled in the territory of the foreign court.

2. By Statute

The Uniform Law Conference Commissioners produced in 1933, and later revised, a draft *Uniform Foreign Judgments Act* which did not, however, enlarge the grounds upon which a foreign judgment might be enforced by action except to provide that a defendant who carried on business in a province of Canada was subject to the jurisdiction of the courts of that province. The Uniform Act also set out what the common law defences were. The Act has been adopted by legislation only in Saskatchewan and New Brunswick.[6]

In British Columbia, there is no general statute that addresses the grounds on which a court will recognize a foreign judgment. The *Divorce Act, 1985*[7] provides that the residence of either the plaintiff or the defendant in a province is a sufficient ground for assuming jurisdiction and accordingly obliges all provincial courts to recognize a judgment given upon such ground. Further, in section 22, a divorce granted in a country other than Canada must be recognized for all purposes if either the plaintiff or the defendant was ordinarily resident in that country for at least one year immediately preceding the commencement of proceedings for the divorce. The *Court Order Enforcement Act*[8] permits a money judgment of a recip-

5. McLeod, pp. 632-634; Cheshire, pp. 354-358; Nygh, pp. 90-91; Read, Chapter IV.
6. Read, Appendix A; Castel, s. 171; Nadelman, pp. 72-74.
7. Section 5.
8. R.S.B.C. 1979, c. 75, s. 31.

rocating state to be registered and allows registration of a default judgment where the judgment debtor was carrying on business or was ordinarily resident in the territory of the reciprocating state. At common law, the fact that a defendant (not a corporation) carried on business in the territory of the foreign court was not a ground for recognition of a foreign judgment. Since enforcement implies recognition, the result is that this Act appears to have enlarged the grounds of recognition in those cases covered by the Act.[9]

B. Enforcement

1. At Common Law

A foreign judgment could not at common law be directly enforced in the territory of a domestic court. A judgment of the domestic court had first to be obtained. Such a judgment could be obtained in one of two ways:

(1) By suing on the original cause of action and pleading the foreign judgment as an estoppel to any defence raised to the merits; or

(2) By suing on the foreign judgment as a cause of action on the basis that the judgment created a legal obligation upon which a new action could be founded.[10]

To enforce a foreign judgment *in personam* by action, two conditions had to be met:

(1) The judgment must be final; and

(2) The judgment must be for a sum certain in money.[11]

To enforce a foreign judgment *in rem* an action *in rem* may be brought in the domestic court, or an action for conversion or detinue may be brought pleading the judgment as the source of title.[12]

2. By Statute

Most provinces have adopted legislation based on the *Uniform Reciprocal Enforcement of Judgments Act* proposed

9. Cheshire, pp. 401-402.
10. Cheshire, pp. 337-341; McLeod, pp. 579-583; Nygh, pp. 94-96.
11. Cheshire, pp. 358-361; Read, pp. 271-272.
12. Cheshire, p. 358; Dicey, pp. 456-458.

by the Uniform Law Conference Commissioners in 1924 and revised from time to time.[13] The Uniform Act has been adopted in all nine common law provinces and in the two Territories. In British Columbia its operation has been extended to some foreign countries.[14]

In British Columbia, the provisions of the Uniform Act are incorporated as Part 2 of the *Court Order Enforcement Act*. The effect of the Act is purely procedural. It is provided that money judgments from reciprocating states may be enforced upon registration. This avoids the necessity for bringing an action upon the judgment. The Act does not broaden the grounds upon which extra-provincial judgments are recognized. The law of British Columbia determines whether the original court had jurisdiction and whether the foreign judgment should be given conclusive effect.[15]

The Canada-United Kingdom Convention[16] makes similar provisions in respect of United Kingdom money judgments.[17]

Under the provisions of section 70.1(8) of the *Family Relations Act*,[18] a final order for maintenance may not be enforced but must be treated only as a provisional order where the court granting the order had no jurisdiction under the conflict of laws rules of British Columbia.

C. Defences

The common law defences to an action upon a foreign judgment may be summarized as follows:

(1) The original court acted without jurisdiction (either internal or international).

(2) The defendant is not duly served and did not appear.

(3) The judgment is obtained by fraud.

(4) The judgment is not a final judgment.

---

13. Nadelman.
14. Fraser, p. 1987.
15. Section 31(6)(g) provides that no order for registration shall be made if the court is satisfied that "the judgment debtor would have a good defence if an action were brought on the judgment."
16. Schedule 4 to the *Court Order Enforcement Act*.
17. Castel, s. 177.
18. R.S.B.C. 1979, c. 121.

(5) The judgment is not for a sum certain in money.

(6) The judgment is contrary to domestic public policy.

(7) The judgment is to enforce a foreign penal or revenue law.

(8) The judgment was obtained in contravention of the principles of natural justice.[19]

The defences listed in the *Court Order Enforcement Act* and the Canada-United Kingdom Convention are similar. It should be noted, however, that under both these enactments, the submission of the defendant to the jurisdiction of the original court must be by way of voluntary appearance in the proceeding. It is not sufficient that he has submitted by a prior contract to do so.

Commentary

The subject of the recognition and enforcement of foreign judgments has been under review by numerous international and interprovincial bodies for nearly the whole of this century. Many bilateral and multilateral arrangements have resulted. Within Canada, uniform provincial legislation has been enacted, and treaties entered into by the federal government have been put into effect in the provinces. Of most importance is the work of the Uniform Law Conference,[20] the Commonwealth Secretariat,[21] the Hague Conference on Private International Law,[22] and the drafters of the European Economic Community Brussels Convention.[23] The subject is presently under preliminary scrutiny by the British Columbia Law Reform Commission. In relation to interprovincial product liability claims, Sharpe has recently published an important contribution on the topic.[24] Yet for all this, our law remains in an unsatisfactory state. The common law principles relating to recognition and enforcement of foreign judgments took final shape in the nineteenth century, before the jurisdictional reforms brought about by the *Common Law Procedure Act*. The principles upon which recognition of the jurisdiction of a for-

19. Read, Chapter VIII; Cheshire, pp. 370-384; McLeod, pp. 609-621; Nygh, pp. 99-103.
20. Nadelman; *see* proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada, Reports of 1958, 1961, 1963, 1981, 1982, 1985.
21. McLean & Patchett.
22. Sharpe, p. 57.
23. Kaye.
24. Sharpe, Chapter 2.

eign court to give a judgment enforceable by a domestic court were based bore a direct relationship to the principles upon which a domestic court would itself assume jurisdiction. Allegiance (encompassing presence when served) or submission founded domestic jurisdiction. Allegiance (encompassing presence, residence or nationality) or submission were the grounds upon which the jurisdiction of a foreign court would be recognized. One would have expected that when the grounds of domestic jurisdiction were enlarged, a corresponding enlargement would follow in the grounds upon which foreign jurisdiction was conceded. But this was not to happen.

Blackburn J., whose judgment in *Schibsby* v. *Westenholz*[25] has been consistently followed, was originally of the view that just such an enlargement had taken place in consequence of the passage of the *Common Law Procedure Act*, but he was persuaded otherwise. In the result, the law relating to recognition and enforcement of foreign judgments remained static, while the law of domestic jurisdiction rapidly expanded. The courts, though free to allow the common law to adapt itself to the demands of modern society, abandoned that task to the legislature. Only in the case of recognition of divorce decrees did the courts feel compelled by the pressures of society to move away from the restrictions of the common law. The legislatures were equally reluctant to make any radical changes. Facilities for enforcement of money judgments and maintenance orders were improved, but these reforms as a rule were administrative in nature. They did not affect, and frequently preserved by statute, the old common law rules of recognition. Particularly in Canada, where full faith and credit is not required by the constitutional law to be given to judgments of other provinces, the lack of an effective and principled system of judgment recognition imposed by agreement between the provinces is remarkable.[26]

What are the principles upon which a court should act when asked to give effect to a foreign judgment?

It was originally suggested that "international comity" was the applicable principle. But by the middle of the nineteenth century, it was recognized that the true principle was

25. (1870) 6 L.R. Q.B. 155, approved in *Emanuel* v. *Symon*, [1908] 1 K.B. 302 (C.A.).
26. Nadelman.

that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant which a domestic court is bound to enforce, as it is bound to enforce other legal obligations freely undertaken. Thus, the courts will not permit a re-trial of issues disposed of by the judgment creating the obligation.[27]

There is no element of reciprocity here. Courts do not enforce foreign judgments on the basis that their own judgments will be reciprocally enforced, but because an obligation has been created which domestic law will recognize as establishing a cause of action.

Why then will the courts only enforce a judgment of a foreign court upon the most limited view of whether that court was competent to exercise jurisdiction? Residence or submission are the only grounds upon which jurisdiction of a foreign court will be recognized. Yet a domestic court will itself assert jurisdiction on grounds very much wider than residence or submission. This inconsistency in attitude has been commented upon frequently and unfavourably.[28]

In *Travers* v. *Holley*[29] a divorce decree given to a wife resident in New South Wales at a time when her husband (and accordingly she), was not domiciled in New South Wales was recognized on the common sense ground that since English legislation permitted a deserted wife to sue for divorce in England on the grounds of residence, the decree of a foreign court given upon the same jurisdictional ground should be recognized.

In *In re Dulles' Settlement*,[30] Lord Denning said in *obiter dicta*:

> I do not doubt that our courts would recognize a judgment properly obtained in the Manx courts for a tort committed there whether the defendant voluntarily submitted to the jurisdiction or not; just as we would expect the Manx courts in a converse case to recognize a judgment obtained in our courts against a resident in the Isle of Man on his being properly served out of our jurisdiction for a tort committed here.

27. Gibb, pp. 231-238; Cheshire, pp. 338-339.
28. Kennedy; Kennedy (2); McLeod, pp. 582, 598-599; Sharpe, p. 68.
29. [1953] 2 All E.R. 794 (C.A.).
30. [1951] Ch. 842, 851 (C.A.).

But this view did not prevail in subsequent cases not involving a judgment as to status.[31]

Professor Gilbert Kennedy, in two articles published in 1954 and 1957,[32] has argued strenuously that the principles set out in *Travers* v. *Holley* should be applied to foreign judgments *in personam* and not confined to judgments *in rem* (which was the case in *Travers* v. *Holley*). He points out that the concept of "reciprocity" is correctly invoked in asking whether the foreign court has applied jurisdictional rules similar to those which would have been used in the domestic court. The word is not correctly used to describe whether the foreign court would in like circumstances give effect to a domestic judgment. He concludes:[33]

> The type of reciprocity that is important, legally as well as otherwise, is not that we do unto others as they are prepared to do unto us, but that we accept as valid in others what we are prepared to do ourselves.

Professor J. G. Castel has said,[34]

> As jurisdiction has always been the most important obstacle to recognition of foreign judgments, there is no doubt that the principle of jurisdictional reciprocity more than that of real and substantial connection can be an excellent method for facilitating the recognition and enforcement of foreign judgments in the forum. This principle should at least be followed in federal states where statutory as well as common law jurisdictional principles are not substantially different.

In a recent decision of the British Columbia Court of Appeal, *Morguard Investments Ltd.* v. *de Savoye*,[35] this principle was adopted in a case in which the plaintiff mortgagees had obtained a deficiency judgment against the defendant mortgagor. The defendant at the time of service was resident in British Columbia and did not defend the action nor in any other way attorn to the jurisdiction of the Alberta court. Actions were commenced on the deficiency judgments in British Columbia and the plaintiffs applied for summary judgment which was granted. On appeal, the Court of Appeal approved the recent decision of Gow C.C.J. in *Marcotte* v. *Megson*[36] and the writings of Professor Kennedy and Castel and held that,

---

31. *Re Trepca Mines*, [1960] 3 All E.R. 304 (C.A.); *Rafferty's Restaurants* v. *Sawchuk*, [1983] 3 W.W.R. 261 (Man. Co. Ct.); Morris, pp. 116-117; Dicey, pp. 448-450; Nygh, p. 85.
32. Kennedy; Kennedy (2).
33. Kennedy (2) at p. 149.
34. Castel (3) at p. 50.
35. (1988) 27 B.C.L.R. (2d) 155. This decision is the subject of an appeal to the Supreme Court of Canada.
36. *Marcotte* v. *Megson*, (1987) 19 B.C.L.R. (2d) 300 (Co. Ct.).

whatever the rule might be as to other foreign judgments, the judgments of the courts of other Canadian provinces would be enforced in British Columbia, if those courts had exercised a jurisdiction which British Columbia courts would exercise in a like case.

It remains to be seen whether the courts of other provinces will follow suit and whether the principle adopted in this case will meet with the approval of the Supreme Court of Canada.

If generally adopted, the result of this principle would be that the rules relating to assumption of jurisdiction would also be the rules for recognition of Canadian judgments.

Whether in such case jurisdiction has been exercised on similar grounds may not always be apparent, especially in cases of judgments emanating from New Brunswick or Prince Edward Island where there are no enumerated grounds for service *ex juris*. Since, necessarily, the question of jurisdiction will only arise when dealing with a default judgment because any other judgment will have involved a submission to the court's jurisdiction, it may not be apparent upon what basis the court did exercise jurisdiction. If it is not apparent, and the plaintiff cannot show that the grounds of jurisdiction exercised were similar to those which would be exercised by the enforcing court, then the judgment should not be recognized or enforced.

What Professor Kennedy has referred to as being the concept of "reciprocity" has been more accurately described as the "mirror-image" approach. That there are objections to this "mirror-image" has been pointed out by Sharpe.[37]

The House of Lords in *Indyka* v. *Indyka*[38] rejected the "mirror-image" approach in *Travers* v. *Holley* and preferred to rest recognition of a foreign divorce decree on the basis of a "real and substantial" connection between the petitioner and the territory.

Read, in his monumental work *Recognition and Enforcement of Foreign Judgments*, had espoused the same approach

37. Sharpe, pp. 66-72.
38. [1967] 2 All E.R. 689 (H.L.).

when he concluded[39] that the central principle of recognition could be expressed as follows:

> Jurisdiction depends on the existence at the time the foreign action is commenced of a relation between the person, status, or thing concerned and the territory of the foreign law district sufficient to justify, on grounds of judicial reason or ideas of social value or both, the conclusion that the law of that district should be recognized as having power to create through its judicial process rights concerning that person, status, or thing.

Should therefore the basis of the recognition of a foreign judgment be, not that a domestic court would have done likewise, but that there is a "real and substantial" connection between the judgment debtor and the territory or the subject matter of the action and the territory?

Whether there is such a connection and, if so, whether it is "real" and "substantial" may be matters of degree and perhaps of opinion. Grounds upon which a domestic court will assume jurisdiction are, in contrast, usually legislated, reasonably clear and readily ascertainable.

It is an important consideration that whatever principle is adopted it should be clear and readily ascertainable. Where a British Columbia plaintiff wishes to institute an action against a foreign defendant and there is a choice to be made between suing in British Columbia and suing in the defendant's forum, one question which the plaintiff will wish to have answered in advance is whether, if he obtains judgment in the foreign forum, he will be able to enforce it in British Columbia. Similarly, where a plaintiff who has obtained a foreign judgment wishes to enforce it in British Columbia, he will want to know in advance whether he may enforce it by registration or by suing on the judgment or whether he must sue on the original cause of action.

If the principle upon which British Columbia courts will recognize the jurisdiction of the foreign court is "reciprocity," then it is a comparatively simple matter to examine the rules of the Supreme Court to determine whether a British Columbia court would in a like case assert jurisdiction. If the principle is "a real and substantial connection," the answer will be less clear and not so easily ascertainable.

---

39. At pp. 257-258.

It should be recognized, however, that in the actual result the two competing tests are probably not far apart. Any list of grounds upon which a court will assume jurisdiction is apt to be a list of circumstances in which there is presumptively a real connection between the *lis* and the *forum*.

The rule laid down by the British Columbia Court of Appeal appears, then, to be both principled and practical. For the purposes of this study it is sufficient, without going any further, to recommend that the rule be accepted as a principle.

The whole subject of Interprovincial Enforcement of Judgments deserves, and is receiving from the Law Reform Commission, considerable attention. It may be that the Commission's work will have its effect upon the entire field of judge-made law in the area of foreign judgment recognition. But in the meantime it would be sensible to assume, and be constantly aware of the fact, that any redefinition of the grounds for the exercise of extra-territorial jurisdiction will, *ipso facto*, become a redefinition of the grounds upon which the judgments of other provincial courts will be recognized.

Proposed Principle

29. Where a court is asked to recognize and enforce a judgment of a court in another province or territory of Canada and that court has taken jurisdiction in like case as would a court in the province, then the jurisdiction of that other court should be recognized.

A. Form of Originating Process

Under the *Common Law Procedure Act, 1852*[1] and the *Judicature Act, 1875*,[2] leave to serve the writ itself out of the country would be granted where the defendant was a British subject wherever resident or where the defendant was a foreign subject resident in a British Dominion. The theory was that British subjects were amenable to the command of the Sovereign wherever they might be while foreigners were only amenable to such command if they were in one of the Sovereign's Dominions and accordingly owed allegiance.[3] The writ of summons at that time contained a command to enter an appearance.

Notice of the issuance of the writ could, however, be served without offending the sovereignty of a foreign country. This Rule persisted in England until 1981, and in British Columbia until 1976.

British Columbia Rule 13 now makes no provision for service of a notice in lieu of the writ. Neither a writ of summons nor a petition contains any command of the Sovereign. Both forms of originating process now simply serve the function of giving notice to the defendant or respondent.[4]

B. Endorsement of Grounds of Jurisdiction

In jurisdictions such as British Columbia, where no leave is required to serve out of the province, the grounds upon which it is alleged that service may be made must be set out in the originating process or by endorsement.[5] It is also generally provided that in cases where leave is required, the originating process should be served together with the order granting leave and any affidavit or other evidence used to obtain the order.[6]

---

1. Section 19.
2. Order 11, Rule 1.
3. Watson, Borins & Williams, p. 252; *Gohoho* v. *Guineau Press*, [1962] 3 All E.R. 785 (C.A.).
4. In England, the name and title of the Sovereign no longer appears on any originating process and nor does it do so in Ontario. The name and title of the Sovereign appears on the British Columbia writ but the British Columbia Rules Revision Committee in 1976 recommended against continuing the use of the Sovereign's name and title on the writ of summons. This recommendation was not accepted.
5. For Ontario, *see* Rule 17.04(1); New Brunswick, Rule 19.03(1); Saskatchewan, Rule 33(2); New Zealand, Rule 221.
6. B.C. Rule 13(5). *See also* Ontario Rule 17.04(2); New Brunswick Rule 19.03(2).

C. Mode of Domestic Service Under the Rules

In Chapter XII it was suggested that the rule that service upon an agent residing or carrying on business in the territory founds jurisdiction should be abolished. However, the purely procedural advantage of serving the agent in the territory rather than the principal out of the territory should be maintained on grounds of convenience and economy. In circumstances where, under other principles, the court has jurisdiction over a defendant who resides out of the territory, it ought to be permitted to serve the agent who carries on business or resides in the territory. In such case, however, it seems proper that the foreign defendant should have the same period in which to enter appearance as if he were served out of the territory.

Proposed Principle

30. Where service upon a person outside the province is permitted, substituted service upon an agent of such person residing or carrying on business in the province should be permitted without order, but the time for entry of appearance should not for that reason be abridged.

D. Mode of Service Under Contract

As was pointed out in Chapter XII, even though a party might by contract submit to the jurisdiction of the court and might by contract agree that service be effected out of the territory, it was still necessary by rule to authorize service in the manner provided for by the parties because it was service that founded jurisdiction and not the contract. A provision should nevertheless be maintained in the Rules authorizing service in a manner provided for by the parties.

Proposed Principle

31. Where a contract provides that a court in the province has jurisdiction in a matter, service upon a party to the contract who is out of the province should be allowed in such manner, if any, as is provided in the contract or as is provided in the Rules of Court.

E. Mode of Service under the Rules

Under the *Common Law Procedure Act, 1852*, personal service upon an absent defendant was required, or proof that by substituted means the writ had come to his knowledge. The *Judicature Act, 1895*,[7] made no special provision for mode of service abroad. Subsequent English Rules[8] provided that service out of the country might be made in the same manner as service within the country, but provided that nothing in the Rule should authorize or require the doing of anything in a country in which service was effected which was contrary to the law of that country, and that service might properly be effected in accordance with the law of that country.

Many Canadian provinces provide by rule that a document to be served out of the province may be served in the manner provided for by local rules or in a manner provided by the law of the territory where service is to be made.[9] It is also provided that proof of service may be made in the manner provided for by local rules or in a manner provided by the law of the territory where service was made.

The British Columbia Rules of 1976 contain no reference to the mode of service of documents abroad (save for Rule 13(11) which relates to actions under the *Carriage by Air Act*.) Since Rule 11 does not require service to be effected by any officer of the state, it has become the common practice to arrange for the personal service of process in other provinces and countries to be made privately. Substituted service may be allowed by order under Rule 12. Proof of service is by affidavit[10]. It is doubtful whether a certificate of service by a sheriff in another province would be acceptable under Rule 11(12).

F. Mode of Service under Treaties

Canada is bound by several bilateral treaties which apply to service of civil process.[11] Generally it is provided that a request for service of judicial documents must be sent by a Canadian diplomatic or consulate officer to the competent au-

7. Order XI.
8. *E.g.*, R.S.C. 1965, Order 11, Rule 5.
9. Saskatchewan, Rule 32; Ontario, Rule 17.05; New Brunswick, Rule 19.04; Nova Scotia, Rule 10.08.
10. Rule 11(7).
11. *See* list of such treaties in Castel, s. 126.

thority of the state where the documents are to be served. The request for service accordingly is made to the Department of External Affairs. Some treaties, however, provide for service by a diplomatic or consulate officer of the requesting state without intervention by the authorities of the requesting state.[12]

The 1961 British Columbia Rule M.R. 70a provided for service to be effected through formal channels in a foreign country to which the Rule was, by order of the Chief Justice, applied. This Rule was introduced in 1961 and repealed in 1976. Apparently no such country was ever designated by the Chief Justice, though the purpose of the elaborate provisions made by that Rule for transmission of process for service through the Secretary of State was to make the Rules conform to the various conventions to which Canada was a party. Mr. Justice Wilson (as he then was) advised the Chief Justice against making any order compelling litigants to use the expensive and time consuming governmental channels specified in the Rule.[13] Canada is now a signatory to the 1965 Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial Matters, but the Convention has not yet been brought into force. When the Convention is brought into force, it will require significant amendment to the Rules to provide for the machinery for service of documents outside of British Columbia and for service of foreign documents within British Columbia. The adoption of the treaty will create difficulties for litigants accustomed to using informal methods of service in foreign countries. For example, no default judgment may be given unless service was effected by a method prescribed by the Convention.[14] Some provinces already have in place a procedure for serving documents out of the jurisdiction which might satisfy the provisions of the Hague Convention.[15]

12. *See* Castel, s. 126; *see* English Order 11, Rule 6.
13. *See* (1975) 33 *Advocate*, pp. 161, 384.
14. *See* the report of Mr. Tallin in *Uniform Law Conference* (1979), Appendix T.
15. Nova Scotia, Rule 10.08; Prince Edward Island, Rule 10.08; New Brunswick, Rule 21.10; *see also* New Zealand, Rule 224; and English Order 11, Rule 5.

Commentary

There would seem to be no difficulties encountered in respect of the form of the originating process or the endorsement thereon.

As to service, it would seem to be desirable that the Rules make provision for how service should be effected out of the jurisdiction to cover cases where treaties are not in force, or when the party does not desire to serve in accordance with treaty provisions. Ontario Rule 17.05 would appear to be a suitable model to follow. It reads as follows:

> 17.05(1) An originating process or other document to be served outside Ontario may be served in the manner provided by these rules for service in Ontario, or in the manner prescribed by the law of the jurisdiction where service is made if that manner of service could reasonably be expected to come to the notice of the person to be served.
>
> (2) Service may be proved in the manner prescribed by these rules for proof of service in Ontario or in the manner provided by the law of the jurisdiction where service was made.

The Ontario Rule would, for example, permit service in England by mail[16] and proof of service by affidavit showing that a copy of the writ has not been returned to the plaintiff through the post undelivered to the addressee.[17]

As to cases covered by treaty, since specific rules relating to the Hague Convention will have to be considered by the Rules Revision Committee when the Convention is brought into force, no recommendation is made in respect to such rules except that consideration ought to be given to whether it is necessary or desirable to have a Rule for cases covered by other treaties. It is suggested that nothing should be done to make it more onerous than at present to effect and prove service out of the jurisdiction.

Proposed Principle

32. Unless by treaty or statute, a litigant is compelled to effect service in a foreign country through the agency of diplomatic or governmental officials, a litigant should be permitted to serve process in any manner

---

16. English Order 10, Rule 1(2)(a).
17. Order 10, Rule 1(3)(b)(ii).

(a) *provided for service in the province by the Rules of Court; or*

(b) *authorized for service of process in the country in which service is to be effected.*

G. Mode of Service Under Other Statutes

Where a statute confers jurisdiction on a court over a foreign defendant or thing, it may be necessary to provide by rule for the mode of foreign service if the statute is silent on the matter. In British Columbia, only one statute is so treated in the Rules, namely the *Carriage By Air Act* (Canada).[18] British Columbia seems to be alone in Canada in making specific provisions for the mode of service of process under the *Carriage By Air Act*.[19]

There should be a general Rule covering all such statutes. The provisions of Rule 13(11) are cumbersome, and nothing in the *Carriage By Air Act* or the Convention requires the protocol embodied in the Rule.

Proposed Principle

33. Where a statute authorizes a proceeding to be commenced in the province against a person out of the province, then service upon a person who is out of the province should be permitted in such manner, if any, as is provided in the statute, or as is provided in the Rules of Court.

---

18. Rules 13(1)(n) and 13(11). The *Trust Variation Act*, R.S.B.C. 1979, c. 413 may be another case which should be covered by Rule 13.

19. But specific provision is made in New Zealand (Rule 223). The equivalent English Rule was repealed (*see Supreme Court Practice*, s. 11/1/28).

CHAPTER XXIV THE NEED FOR REFORM AND SUGGESTIONS FOR IMPLEMENTATION

The primary concern of this study is the allocation of judicial business between British Columbia and other countries or provinces, according to the relationship between the particular action and the territory of the forum. This determination is a crucial one. The maintenance of an action in an inappropriate forum may subject the defendant to unwarranted financial hardship, to triers of fact with prejudices in favour of local plaintiffs or a propensity to award large sums in damages, or to the application of substantive rules of law to which the defendant would not be subject in his "home" territory and to which he might not be thought to have subjected himself by conducting his affairs in the plaintiff's "home" territory. The tribunal in an inappropriate forum may not always be able to protect adequately the interests of parties not directly involved in the controversy or to issue orders which require the cooperation of administrative or judicial agencies in the territory to whose laws the defendant is subject.[1]

At the international level, there is no agency capable of imposing a rational allocation of actions amongst states to minimize the expense and inconvenience to the parties and to secure to each state the ability to adjudicate effectively on matters of its legitimate concern. Such allocation can only be effected by treaties, such as the European Economic Community Brussels Convention or the Hague Conventions. At the national level, Canada, unlike the United States and Australia, affords the federal government no opportunity to make such rational allocations. The Supreme Court of Canada, which is the only body capable of imposing standards for such allocation, has not often been afforded the opportunity of doing so, and cannot do so by reference to Canadian constitutional legislation which is, at best, ambiguous on the subject.

The possibility exists of a model statute on the subject. If all provinces were to agree upon the basis on which jurisdiction should be exercised and were to discipline their own litigants by denying access to the province's courts in cases not authorized by such agreement, then it would be a relatively

1. *See Essays on Civil Procedure*, pp. 911-913.

simple matter to give full faith and credit to the judgments of the several provinces. However, the Uniform Law Conference Commissioners have never taken up the subject of jurisdiction but have confined themselves to the subject of recognition and enforcement of foreign judgments. The crowded state of the Conference's agenda and the lack of a permanent secretariat, probably excludes any realistic possibility that the subject might be taken up.

The possibility also exists that separate agreements between the provinces might be arrived at. If, say, Ontario and British Columbia were to harmonize their rules as to the assumption of jurisdiction, then agreement to give full faith and credit to one another's judgments might readily follow. And, even if their rules were not harmonized, agreement to give effect to one another's judgments, either administratively or judicially, where such judgment was based upon a ground of jurisdiction, which the receiving state would itself have asserted, might be possible.

These may be goals worth striving for. But, in the meantime, British Columbia, should, it is suggested, attempt to formulate for itself rational principles for the assumption of jurisdiction and for the recognition and enforcement of the judgments of the courts of other provinces, not in search of reciprocity but in a spirit of doing justice to all litigants before the court.

With this object in view, the preceding chapters have outlined the present law as to jurisdiction where foreign elements are involved, have noted perceived deficiencies in the law and have proposed principles which might be adopted as a basis for reform.

That there is a need for reform is clear. The question is whether any effective reform can be brought about solely by changes to the Rules of Court relating to service *ex juris*. Some reforms have been achieved in this way. There have been sporadic and piecemeal enlargements of the assumed jurisdiction of the British Columbia courts and procedures for authorizing service out of the jurisdiction have been simplified. However, as pointed out in Chapter I, the law of jurisdiction is a complex mix of common law principles, the rules of court and statutes. It is plain that the common law has been too slow to adapt itself to the needs of a society in which national and provincial

boundaries have diminishing relevance and particularly so where, as in Canada, the separate "law districts" within the federal state continue to apply principles which were thought to be applicable between Sovereign states.

To effect reforms which are principled and directed to overcoming the deficiencies of the common law in relation to the assumption of jurisdiction, to the declining of jurisdiction and to the recognition and enforcement of foreign judgments, changes in the Rules of Court are not enough.

The *Court Rules Act* permits rules to be made only in relation to practice and procedure, and section 62 of the *Supreme Court Act* permits rules to be made only in relation to pleading, practice and procedure. It is an historical anomaly that, by way of Rules of Court relating to service of process out of the jurisdiction, the jurisdiction of the courts has been enlarged or restricted, essentially by regulations. It is, however, reasonably clear that at the present no amendment to the Rules of Court under the guise of "practice and procedure" could restrict the court's jurisdiction over persons whom, historically, the common law has regarded as being amenable to that jurisdiction, or to give effect to foreign judgments which the common law would not give effect to.

To carry out reforms by means of one or more statutes would probably entail more time and more political interest than can be reasonably expected. Furthermore, the ability to fine-tune the provisions of such statutes, which would inevitably be required, would in practice be lost.

It is suggested, therefore, that the *Court Rules Act* be amended to authorize the Lieutenant Governor, on the advice of the Attorney General made after consultation with the Chief Justice, to make rules not inconsistent with the *Supreme Court* or *County Court Act*, relating to the exercise of jurisdiction over persons and things by those courts and to the recognition and enforcement of foreign judgments.

Such a basic reform of the law of jurisdiction, though not by rules of the Court, was carried out in a reasonably expeditious manner in the case of Scotland. Section 20 of the *Civil Jurisdiction and Judgments Act, 1982*, provides that "Schedule 8" (which is headed "Rules as to Jurisdiction in Scotland") "has effect to determine in what circumstances a person may

be sued in civil proceedings in the Court of Session or in a Sheriff Court." The Scottish Commission which drafted Schedules 8 and 9 of the Act in a comparatively short time, abandoned some long held, but exorbitant, grounds of jurisdiction and adopted others which appeared to be best suited to present day needs, not only in a commercially united Europe but elsewhere.

Any similar body charged with the task of drafting legislation, whether by statute or by rules, to accomplish some fundamental reforms, would, it is obvious, have to consult and read widely. But that task while formidable would not, it is suggested, be overwhelming either in time or expense.

It is hoped that this study will have demonstrated the need for some expenditure of time and money upon the reform of our laws of jurisdiction.

CHAPTER III

RELATIONSHIP BETWEEN JURISDICTION AND PRESENCE

1. The court should not have jurisdiction over a person, whether natural or artificial, by reason solely of the fact that

(a) the person;

(b) an officer or agent of an artificial person; or

(c) a member of a partnership

has been served within the province. (**Page 33**)

CHAPTER IV

RELATIONSHIP BETWEEN JURISDICTION AND DOMICILE OR RESIDENCE

2. (1) The court should have jurisdiction where, at the time of commencement of the proceeding, the defendant is ordinarily resident in the province.

(2) A natural person is ordinarily resident in the province, if the nature and circumstances of his residence indicate that he has a substantial connection with the province.

(3) A corporation is ordinarily resident in the province, if

(a) the corporation was formed under the laws of the province;

(b) the corporation has a registered office or some other official address in the province;

(c) the corporation has a place of business in the province; or

(d) the central management and control of the corporation is exercised in the province.

(4) "Official address" means an address which the corporation is required by law to register or maintain for the purposes of receiving notices or other communications.

(5) A partnership is ordinarily resident in the province, if

(a) one of the partners is ordinarily resident in the province; or

(b) the partnership has a place of business in the province.

(6) An unincorporated association is ordinarily resident in the province if

(a) an officer of the association is ordinarily resident in the province; or

(b) the association has a location in the province for the purpose of conducting its activities.

(Pages 37-38)

CHAPTER V

RELATIONSHIP BETWEEN JURISDICTION AND CARRYING ON BUSINESS

3. The court should have jurisdiction over a person

(a) who has a place of business in the province, whether or not the cause of action is in respect of that business; and

(b) who, although he has no place of business in the province, carries on business in the province, and the cause of action is in respect of that business.

(Page 41)

CHAPTER VI

RELATIONSHIP BETWEEN JURISDICTION AND SUBMISSION

4. (1) The court should have jurisdiction where

(a) a person has initiated a proceeding in the court, in respect of any claim made against that person in the same proceeding by any other party to the proceeding;

(b) a defendant has voluntarily entered appearance or taken part in the proceeding;

(c) the defendant has expressly or impliedly agreed to submit to the jurisdiction of the court;

(d) a written instrument has conferred jurisdiction on the court and the proceeding is brought in respect of the relations between or rights or obligations of that person and any other person under the written instrument; or

(e) the proceeding is brought to enforce a judgment against a judgment debtor who has voluntarily entered appearance or taken part in the original proceeding.

(2) A person who has entered appearance or taken part in a proceeding for the sole purpose of

(a) contesting the jurisdiction of the court over him;

(b) requesting the court to stay or dismiss the proceeding on the grounds of forum non conveniens, *or of an agreement to give jurisdiction to another court or tribunal;*

(c) protecting property seized or threatened with seizure as an interlocutory step in the proceeding, on the grounds that the court has no jurisdiction over him;

(d) applying to set aside a default judgment or an ex parte *order, on the grounds that the court has no jurisdiction over him; or*

(e) appealing against a decision made in respect of the above matters

should not be held to have done so voluntarily. **(Pages 46 - 47)**

CHAPTER VII

RELATIONSHIP BETWEEN JURISDICTION AND NECESSARY PARTIES

5. Where a court has jurisdiction over a person, the court should have jurisdiction over all other persons who are neces-

sary or proper parties to a proceeding, regardless of whether any of them have been served within the province. **(Page 49)**

CHAPTER VIII

RELATIONSHIP BETWEEN JURISDICTION AND IMMOVABLE PROPERTY

6. (1) The court should have jurisdiction where the proceeding is brought to enforce, assert, declare or determine proprietary or possessory rights or security in or over land situated in the province.

(2) The court should not have jurisdiction where the proceeding is brought to enforce, assert, declare or determine proprietary or possessory rights or security in or over land not situated in the province.

(3) The court should have jurisdiction where the proceeding is for trespass to, or any other tort affecting, land situated out of the province in cases where the court would otherwise have jurisdiction over the defendant. **(Page 52)**

CHAPTER IX

RELATIONSHIP BETWEEN JURISDICTION AND MOVABLE PROPERTY

7. The court should have jurisdiction where the proceeding is brought to enforce, assert, declare or determine proprietary or possessory rights or security in or over property, other than land, situated in the province. **(Page 54)**

CHAPTER X

RELATIONSHIP BETWEEN JURISDICTION AND EXIGIBLE ASSETS WITHIN THE TERRITORY

8. The court should not have jurisdiction by reason solely of the fact that assets of the defendant are situated in the province. **(Page 57)**

CHAPTER XI

RELATIONSHIP BETWEEN JURISDICTION AND CAUSE OF ACTION - GENERAL

9. The court should not have jurisdiction, in cases not specifically provided for, by reason solely of the fact that the cause of action arose in the province. **(Page 60)**

CHAPTER XII

RELATIONSHIP BETWEEN JURISDICTION AND CAUSE OF ACTION - CONTRACT

10. The court should have jurisdiction where the claim arises in respect of a contract made in the province, and, where the claim arises in respect of a "quasi-contract," where the obligation arose in the province. **(Page 62)**

11. The court should have jurisdiction where the proceeding is founded upon a contract to be performed, in whole or in part, in the province, except that where the proceeding is founded upon a breach of an obligation under a contract, the court should have jurisdiction only where that obligation was to be performed, in whole or in part, in the province. **(Page 66)**

12.(1) The court should not have jurisdiction by reason solely of the fact that the claim is in respect of a contract governed by the law of the province.

(2) The court should have jurisdiction where the parties to a contract have by its terms agreed that the law of British Columbia shall govern. **(Page 67)**

13. The court should not have jurisdiction by reason solely of the fact that the plaintiff has suffered damage in the province by reason of a breach of contract committed elsewhere.
(Page 68)

14. The court should have jurisdiction where the proceeding is brought to interpret, rectify, set aside, or enforce any deed, contract or other instrument affecting any property, real or personal, situated in the province. **(Page 71)**

CHAPTER XIII

RELATIONSHIP BETWEEN JURISDICTION AND CAUSE OF ACTION - CONSUMER CONTRACTS

15. (1) Where a claim arises in respect of a consumer contract, a defendant should be deemed to have carried on business in the province where he

(a) has reason to foresee that the product or service or identical products or services supplied by him would be available or accessible in the province through commercial channels; or

(b) has acted in any way to further the supply of the product or service in the province.

(2) A consumer contract is a contract for the supply of goods or services, entered into by one party for a purpose outside his trade or profession, with another party who acts in the course of his trade or profession. **(Pages 74 - 75)**

CHAPTER XIV

RELATIONSHIP BETWEEN JURISDICTION AND CAUSE OF ACTION - TORT

16. (1) The court should have jurisdiction where the claim arises in respect of a tort and

(a) the wrongful act was committed in the province, in whole or in part; or

(b) the injury or loss or damage was first inflicted in the province.

(2) The court should not have jurisdiction by reason solely of the fact that an injury suffered by a person or by a person's property out of the province caused continuing or further loss or damage to that person or his property in the province.
(Page 82)

CHAPTER XV

RELATIONSHIP BETWEEN JURISDICTION AND CAUSE OF ACTION - DEFECTIVE PRODUCTS

17. Where it is claimed that in the course of business a defendant has supplied a product in the province which

(a) it is his business to supply;

(b) is defective; and

(c) has caused injury, loss or damage to the person or property of the plaintiff,

the defendant should be deemed to have carried on business in the province if

(d) he had reason to foresee that the product, or identical products supplied by him, would be available or accessible through commercial channels in the province; or

(e) the defendant has acted in any way to further the supply of the product in the province. **(Page 86)**

CHAPTER XVI

RELATIONSHIPS BETWEEN JURISDICTION AND CAUSE OF ACTION - THREATENED WRONGS

18. The court should have jurisdiction where the claim is for an injunction

(a) ordering a party to do or refrain from doing anything in the province; or

(b) affecting real or personal property in the province.
(Page 88)

CHAPTER XVII

RELATIONSHIPS BETWEEN JURISDICTION AND CAUSE OF ACTION - PERSONAL STATUS

19. (1) The court should have jurisdiction in a matrimonial action where the plaintiff or the defendant is ordinarily resident in the province.

(2) The court should have jurisdiction in a proceeding relating to guardianship, custody of or access to a child on the grounds set out in section 40 of the **Family Relations Act.**

(3) The court should in other cases have jurisdiction where the proceeding is to determine the status or legal capacity of a person ordinarily resident in the province.
(Pages 92 - 93)

CHAPTER XVIII

RELATIONSHIP BETWEEN JURISDICTION AND CAUSE OF ACTION - WILLS, ESTATES AND TRUSTS

20. The court should have jurisdiction where there is a claim for the grant of probate or letters of administration for an estate of a deceased person in respect of

(a) real property in the province, or

(b) personal property, wherever situate, where the deceased person at the time of death was ordinarily resident in the province. **(Page 95)**

21. The court should have jurisdiction in a proceeding for the administration of the estate of a deceased person in respect of

(a) real property in the province, or

(b) personal property, wherever situate, where the deceased person at the time of death was ordinarily resident in the province. **(Page 97)**

22. The court should have jurisdiction to interpret a will and to grant consequent relief in respect of

(a) real or personal property in the province, or

(b) personal property, wherever situate, where the deceased person at the time of death was ordinarily resident in the province. **(Page 98)**

23. The court should have jurisdiction in a claim against a trustee in respect of the execution of a trust, or to appoint or remove a trustee, or for any relief or remedy which might be obtained in such a proceeding, where

(a) *the assets of the trust include real or personal property in the province;*

(b) *the trustee is ordinarily resident in the province; or*

(c) *the administration of the trust is principally carried out in the province.* **(Page 100)**

CHAPTER XIX

MISCELLANEOUS RELATIONSHIPS

24. The court should have jurisdiction where the claim is brought to enforce any foreign judgment or arbitral award without any requirement that there be assets in the province. **(Page 102)**

25. The court should have jurisdiction where the claim is brought on behalf of the Crown or a municipality to recover moneys owing for taxes or other debts. **(Page 103)**

CHAPTER XX

GENERAL DISCRETION TO ASSUME JURISDICTION

26. In cases not expressly provided for by Rule, the court should assume jurisdiction:

(a) *over a defendant not resident in Canada, where there is a real and substantial connection between*

(i) *the cause of action;*

(ii) *the subject matter of the proceeding; or*

(iii) *the defendant*

and the province and the court is an appropriate forum to hear the proceeding, and

(b) *over a defendant resident in Canada where the court is the most appropriate forum in Canada to hear the proceeding.*

(c) over a defendant present in Canada where there is no other appropriate forum to hear the proceeding.

(Pages 106 - 107)

CHAPTER XXI

GENERAL DISCRETION TO DECLINE JURISDICTION

27. The court should decline jurisdiction where there is another forum which is a more appropriate forum for the conduct of the proceeding and for securing the ends of justice.

(2) Where the other appropriate forum is in Canada, the court should not decline jurisdiction if the plaintiff shows that it is more reasonable to require the defendant to defend the proceeding in the province than to require the plaintiff to bring the proceeding elsewhere in Canada.

(3) Where the other appropriate forum is out of Canada, the court should not decline jurisdiction if the plaintiff shows that he would obtain a substantial juridical advantage in bringing the proceeding in the province.

(4) Where proceedings involving the same cause of action and between the same parties or some of the same parties have already been commenced in a more appropriate forum in Canada, the court should decline jurisdiction in favour of the more appropriate forum unless the bringing of such other proceeding is vexatious or an abuse of process. **(Page 118)**

28. In declining jurisdiction the court should in appropriate circumstances stay the proceeding upon terms such as:

(a) That the defendant shall in writing agree to submit to the jurisdiction of a named court and, if appropriate, waive any limitation bars.

(b) That the defendant shall in writing submit to the jurisdiction of the court to enforce any judgment of the named court, whether final or not, and whether for payment of money or not.

(c) That the defendant shall in writing submit to an order for costs or interest by the court in place of or in addition to an award of costs or interests made by the named court.

(d) *That the defendant shall put up security for any additional costs that the plaintiff may be put to by reason of a change in forum.*

(d) *That the court may upon good cause shown by the plaintiff set aside the order for a stay of proceedings.*

(e) *That the defendant shall submit to orders of the court for interim relief or protective measures pending adjudication in the named court and to a continuation of such relief or measures despite the order for a stay of proceedings.* **(Page 119 - 120)**

CHAPTER XXII

RECOGNITION AND ENFORCEMENT OF JUDGMENTS

29. Where a court is asked to recognize and enforce a judgment of a court in another province or territory of Canada and that court has taken jurisdiction in like case as would a court in the province, then the jurisdiction of that other court should be recognized. **(Page 132)**

CHAPTER XXIII

PRACTICE AND PROCEDURE

30. Where service upon a person outside the province is permitted, substituted service upon an agent of such person residing or carrying on business in the province should be permitted without order, but the time for entry of appearance should not for that reason be abridged. **(Page 133)**

31. Where a contract provides that a court in the province has jurisdiction in a matter, service upon a party to the contract who is out of the province should be allowed in such manner, if any, as is provided in the contract or as is provided in the Rules of Court. **(Page 134)**

32. Unless by treaty or statute, a litigant is compelled to effect service in a foreign country through the agency of diplomatic or governmental officials, a litigant should be permitted to serve process in any manner

(a) provided for service in the province by the Rules of Court; or

(b) authorized for service of process in the country in which service is to be effected. **(Page 137 - 138)**

33. Where a statute authorizes a proceeding to be commenced in the province against a person out of the province, then service upon a person who is out of the province should be permitted in such manner, if any, as is provided in the statute, or as is provided in the Rules of Court. **(Page 138)**

BIBLIOGRAPHY

The following texts and articles are referred to in this report in abbreviated form. The abbreviated form and full citation are as follows:

A

Advocates Quarterly - (1983) 4 Adv. Q. 332

Anton - *Private International Law* (1967)

B

Barrett - "The Doctrine of *Forum Non Conveniens*," (1947) 35 Calif. L. Rev., 380

Birnbaum - Birnbaum & Wrubel, "Foreign Plaintiffs and the American Manufacturer," (1984) 20 The Forum, 59

Bissett-Johnson - "Jurisdiction over the Manufacturer of Imported Goods in Cases of Negligence - The British Commonwealth Approach," (1970) 48 Can. B. Rev. 548

Bissett-Johnson & Day - *The New Divorce Law* (1986)

Black - *Civil Jurisdiction: The New Rules* (1983)

Blair - "The Doctrine of *Forum Non Conveniens* in Anglo-American Law," (1929) Col. L. Rev. 1

C

Cairns - *Australian Civil Procedure* (2nd ed.)

Casad - *Jurisdiction in Civil Actions* (1983)

Castel - *Canadian Conflict of Laws* (2nd Ed)

Castel (2) - "Jurisdiction and the Exercise of Discretion by the Court - *Forum Conveniens*," (1971) 49 Can. B. Rev. 466

Castel (3) - "Recognition and Enforcement of Foreign Judgments *in Personam* and *in Rem* in the Common Law Provinces of Canada," (1971) 17 McG. L. J. 11

Cheshire - Cheshire and North, *Private International Law* (11th Ed)

Collins - "Some Aspects of Service Out of the Jurisdiction in English Law," (1972) 21 I. C. L. Q. 656

Cowen - Cowen & Mendes da Costa, "The Contractual Forum. A Comparative Study," (1965) 43 Can. B. Rev. 453

D

Dainow - "The Inappropriate Forum," (1935) 29 Ill. L. Rev. 867

Dicey - Dicey and Morris, *The Conflict of Laws* (11th Ed)

Dodd - "Jurisdiction in Personal Actions," (1929) 23 Ill. L. Rev. 427

Duncan - Duncan and Honsberger, *Bankruptcy in Canada* (3rd Ed)

Dunlop - *Creditor-Debtor Law in Canada* (1981)

E

Edinger - "Territorial Limitations on Provincial Powers," (1982) 14 Ott. L. Rev. 57

Edinger (2) - "Discretion in the Assumption and Exercise of Jurisdiction in British Columbia," (1982) 16 U. B. C. L. Rev. 1

Edinger (3) - "The MacShannon Test for Discretion: Defence and Delimitation," (1986) 64 Can. B. Rev. 283

Edinger (4) - "Recent Developments in the English Law of Conflicts: The Spiliada and Aerospatiale," (1989) 23 U.B.C. L. Rev. 373

Ehrenzweig - *A Treatise on the Conflict of Laws* (1962)

Ehrenzweig (2) - "The Transient Rule of Personal Jurisdiction: The "Power" Myth and *Forum Conveniens*," (1956) 65 Yale L. J. 289

Essays on Civil Procedure -

Selected from the pages of the Harvard Law Review (1961). The section "Developments in the Law, State - Court Jurisdiction" is reprinted from (1960) 73 Harv. L. Rev. 909, and the page numbers cited in the footnotes are those of the Law Review

F

Fairley - "Private Remedies for Transboundary Injury in Canada and the United States: Constraints upon Having to Sue Where You Can Collect," (1978) 10 Ott. L. Rev. 253

Falconbridge - *Conflict of Laws* (2nd Ed)

Fine - "Defences Against Recognition or Enforcement of Interstate or Foreign Judgments," (1987) 61 Aust. L. J. 350

Fraser - Fraser and Horn: *The Conduct of Civil Litigation in British Columbia* (1978)

Fridman - "Where is a Tort Committed?" (1974) 24 U. T. L. J. 247

G

Gibb - *The International Law of Jurisdiction in England and Scotland* (1926)

Graupner - "Contractual Stipulations Conferring Exclusive Jurisdiction upon Foreign Courts in the Law of England and Scotland," (1943) 59 L. Q. Rev. 227

H

Hartley - *Civil Jurisdiction and Judgments* (1984)

Hebenton - "Jurisdiction: The Place Where a Tort is Committed," (1966) 2 U. B. C. L. Rev. 361

Hertz - "The Constitution and the Conflict of Laws: Approaches in Canadian and American Law," (1977) 27 U. T. L. J. 1

I

Inglis - "Jurisdiction, The Doctrine of *Forum Conveniens*, and Choice of Law in Conflict of Laws," (1965) 81 L. Q. Rev. 380

J

James - James and Hazard, *Civil Procedure* (3rd Ed)

Johnson - *Conflict of Laws* (2nd Ed)

Johnson (2) - "Foreign Judgments in Quebec," (1957) 35 Can. B. Rev. 911

Journal of Public Law - "Transient Jurisdiction - Remnant of *Pennoyer v. Neff*: A Round Table," (1960) 9 Journal of Public Law 281

K

Kaye - *Civil Jurisdiction and Enforcement of Foreign Judgments* (1987)

Kennedy - "'Reciprocity' in the Recognition of Foreign Judgments," (1954) 32 Can. B. Rev. 359

Kennedy (2) - "Recognition of Judgments *in Personam*: The Meaning of Reciprocity," (1957) 35 Can. B. Rev. 123

L

The Law Commission -
The Law Commission (England), Working Paper No. 87 and The Scottish Law Commission, Consultative Memorandum No. 62, "Private International Law, Choice of Law in Tort and Delict," (1984)

M

Manitoba Law Reform Commission - *Report on Section 83 of the Queen's Bench Act* (1986)

Maxwell - *Report of the Scottish Committee on Jurisdiction and Enforcement* (1980)

McLean - McLean and Patchett, *The Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: Reports to Commonwealth Secretariat* (1975) (1977) and *Report of Second Working Meeting of the Secretariat* (1979)

McLeod - *Conflict of Laws* (1983)

Mendes da Costa - *Studies in Canadian Family Law*

Meyer - "The Jurisdiction of the Courts as Affected by the Doctrine of '*Forum Non Conveniens*,'" (1964) 23 R. du B. 565

Morris - *Conflict of Laws* (3rd Ed)

N

Nadelman - "Enforcement of Foreign Judgments in Canada," (1960) 38 Can. B. Rev. 68

North and Webb - "Foreign Torts and English Courts," (1970) 19 I. C. L. Q. 24

Nygh - *Conflict of Laws in Australia* (4th Ed)

Nygh (2) - "The Fortuitous *Locus Delicti* or the Fortuitous Defendant?" (1970) Aust. Curr. L. Rev. Vol. 1, p. 122

O

Ontario Law Reform Commission - *Report on Products Liability* (1979)

P

Pryles - Pryles and Hanks, *Federal Conflict of Laws* (1974)

Pryles (2) - "The Enforcement of Judgments Under the *Service and Execution of Process Act*," (1972) 46 Aust. L. J. 286

R

Read - *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (1938)

Robertson - "Jurisdiction Clauses and the Canadian Conflict of Laws," (1982) 20 Alta. L. Q. 29

S

Sharpe - *Interprovincial Product Liability Litigation* (1982)

Sullivan - "Interpreting the Territorial Limitations on the Provinces," (1985) 7 Sup. C. L. Rev. 511

The Supreme Court Practice - 1988 edition

Swan - "The Canadian Constitution, Federalism and the Conflict of Laws," (1985) 63 Can. B. Rev. 271

U

Uniform Law Conference - Uniform Law Conference of Canada, *Annual Reports of Proceedings*

V

Von Mehren - Von Mehren and Trautman, "Jurisdiction to Adjudicate: A Suggested Analysis," (1966) 79 Harv. L. Rev. 1121

W

Watson, Borins and Williams - *Canadian Civil Procedure* (1973)

Watson and McGowan - *Ontario Supreme and District Court Practice* (1989)

Queen's Printer for British Columbia©
Victoria, 1989